



# An investigation into the need for further regulation of puffery in advertisements, in light of e-commerce

A thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy

Ravinthiran Vijayasingam

MBA Southern Cross University

LLB (Hons) University of London

School of Graduate School of Business and Law

College of Business

RMIT University

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## DECLARATION

*I certify that except where due acknowledgement has been made, the work is that of the author alone; the work has not been submitted previously, in whole or in part, to qualify for any other academic award; the content of the thesis is the result of work which has been carried out since the official commencement date of the approved research program; any editorial work, paid or unpaid, carried out by a third party is acknowledged; and, ethics procedures and guidelines have been followed.*

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*Ravinthiran Vijayasingam*

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The end of Education is Character.

## **ABSTRACT**

Puffery refers to advertising presentations that are based on exaggerated claims, opinions and superlatives. There are no legal liabilities attached to its usage, and the legal protection given to puffery enables marketers to use it extensively in the promotion of their products. One of the issues with this, however, is that puffery influences purchases despite the exaggerated nature of its claims. The false presentation of products as possessing desirable attributes, or not possessing negative attributes, is thus allowed freedom from legal repercussion. While there are boundaries that separate puffery from misleading conduct, their demarcation is not always clear.

Consumers face the risk of being misled and not having a legal remedy. A consumer in the brick-and-mortar space is able to verify the authenticity of exaggerated claims made before making a purchase decision and thus can abate this disparity. This abatement will not be the same for consumers in the online sphere. Online purchases do not give the consumer an opportunity to examine the product prior to the purchase, and thus reliance on the claims made is higher. Newer trends in marketing and purchasing methods indicate that there is an increasing migration of businesses and consumers to the online medium. This means that there will be a larger population facing the difficulty of determining the authenticity of promotions and products.

This thesis examines the need for tighter regulation in the area of puffery usage in online advertisements in Australia. An analysis of the Conceptual Model, using Partial Least Square Structured Equation Modelling, reveals that marketers' exploitation of legal uncertainties and the consumer's lack of knowledge regarding remedies leads to increased victimisation of consumers. Focus group and online survey findings indicate that the line between puffery and misleading practices is blurred. The continuous litigation taken by the Australian Competition and Consumer Commission against errant companies for misleading practices further substantiates these findings. It is imperative that tighter regulations are implemented so that consumers and marketers are both on equal footing and are fully aware of the boundaries that delineate puffery from misleading conduct. This research hopes to persuade both the private and public sectors to establish appropriate guidelines pertaining to puffery in the online environment.

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## **SUMMARY OF CONTENTS**

This thesis addresses the issue of whether there should be tighter regulation in the area of puffery usage in online advertisements. Puffery occurs when advertisers or marketers use superlatives or exaggerations in order to promote products. There is no legal liability attached to puffery usage, and it remains as a defence in actions taken for misleading conduct. However, previous research has proven that puffery does influence purchasers and that it can blur the line between what is and what is not misleading. This research addresses the need for tighter regulation in the area of puffery usage. The increasing migration of consumers to the online medium has also shaped the focus of this research to address the issue in the context of online advertisements in Australia.

The thesis consists of six chapters that will detail how the issue of puffery regulation has been addressed and the conclusions drawn from it. An overview of the chapters is provided below to facilitate a better understanding of this work. A detailed chapter summary will also be provided for each chapter before the start of the chapter.

### **Chapter One**

This chapter starts out by setting the objectives for this research. The research background is given to introduce the topic and the components that will be covered by this research. The three justifications for this research are then stated and expanded upon. The introduction of the Research Questions follows this. An explanation as to how these questions are answered is also provided.

### **Chapter Two**

Chapter Two details the Literature Review carried out. The chapter begins by explaining puffery and details the previous research carried out in the area. The components that make up and impact upon the subject matter of this research are then explored and explained. The five components discussed come under the headings of Legal Framework, Australian Regulatory Bodies, Online Promotions, Theoretical Marketing underpinnings and the Consumer. This chapter provides an insight as to the inter-connectivity of these factors and the impact they have upon the discussion of puffery regulation. It also provides initial answers to the research questions. The chapter sets up the basis for the plan of action to be found in the next chapter.

### **Chapter Three**

This chapter deals with the research methodology employed in this thesis. The Conceptual Framework and the research paradigms that formed the basis of the research methods utilized are explained here. Both the qualitative and quantitative methods of data collection chosen are introduced here. Focus groups and a survey were deemed to be the best methods to elicit data that could be analysed to answer the research questions.

### **Chapter Four**

Details of the focus group sessions carried out occupy the first half of this chapter. The questions posed are the result of information gathered in Chapter Two. The results obtained from the sessions are analysed in detail in the second half of this chapter. Proposition development for the survey carried out is also found in this chapter. This helps set the tone for the next chapter.

### **Chapter Five**

The second method of data collection, the survey, is discussed in this chapter. Testing of the model for the validity of results is explained and the responses for the survey are analysed. This chapter completes the explanations about methods employed and results arrived at.

### **Chapter Six**

This final chapter looks at the conclusions arrived at by the research methods used. The conceptual model is analysed using Partial Least Square Structured Equation Modelling. The results, which help answer the research questions and affirm the need for tighter regulation of puffery, are to be found in this chapter. Recommendations for future action by public bodies are also found at the end of this final chapter of this thesis.

# **CHAPTER ONE: INTRODUCTION**

## **1.0 Introduction**

This chapter introduces the topic of this research and explains why puffery was chosen as the focal point of this research. Background information is provided to explain why puffery is examined in the online context. The process of identifying the gap in the literature is also detailed. The civil lawsuit involving Red Bull energy drinks in 2014 is then explained. This case represents the most far-reaching attack on puffery and the misleading effect it can have. The lawsuit provides one of the supporting arguments for the need for investigation into puffery regulation.

A brief overview of the law surrounding puffery and misleading conduct is supplied, to show the freedom that puffery enjoys from legal repercussions. This is to give some idea of the law, which is then discussed in greater detail in Chapter Two. A brief introduction to previous research done on puffery, to show the influential effect it can have, is also provided. Once again, this provides a prelude to the greater elaboration found in Chapter Two.

The three justifications for this research are then discussed. The first two justifications sit within the area of Law, while the third sits within the realm of Marketing. The first justification for this research is that it contributes to legal theory by clarifying the position regarding puffery and the need for further regulation. The second justification for this thesis is that it examines the relevance of ‘caveat emptor’ and its basis for puffery in the cyber age. The last justification is that this research determines whether usage of puffery in advertising is ethical.

The primary and secondary questions are discussed at the end of this chapter, and this sets the tone for the whole research, which will be explained in Chapters Two and three, explored in Chapters Four and Five, and concluded with recommendations in Chapter Six, the final chapter for this thesis.

## **1.1 Objective**

This thesis will shed light on the need for further regulation in puffery and online promotion. Recommendations to reconcile the rights of consumers in relation to marketers’ promotional demands are also proposed.

## 1.2 Background

Laws are made to serve a variety of purposes. Some of these purposes include resolving disputes, maintaining social order, reinforcing community values, helping the disadvantaged, stabilising the economy, and preventing the misuse of power (James 2017, pp 9-10). If we examine the purpose of reinforcing community values in the context of businesses and consumers, we find that laws are put in place to ensure that businesses do not take advantage of their superior bargaining position to cause detriment to consumers (James 2017, p 10). Businesses are defined as persons, partnerships or corporations engaged in making, buying, or selling goods or providing services in exchange for money (Merriam-Webster Dictionary 2017). The definition in s.2 of Australian Consumer Law states that a business can be carried on even if profit is not its motive. Consumers are defined in s.3(1) of Australian Consumer Law as persons who purchase goods and services for personal use and s 3(2) states that the purchase should not be for the purpose of resupply or manufacture.

In Australia, the laws that are in place to achieve the purpose of reinforcing community values in the context of businesses and consumers are the Australian Consumer Law (hereafter known as ACL), set out in Schedule 2 of the Competition and Consumer Act 2010, the Goods Act of the different states, and Common Law. The laws found within these sources protect consumers from scams, breaches of consumer guarantees, and misleading practices. Details of these can be found in Chapter Two. One area that fails to offer any protection to a consumer, however, is the area concerning Puffery usage. Puffery is the usage of exaggerated statements or opinions by businesses about a product in order to market it. James (2017, p 397) states that puffery includes ‘exaggerated and even false claims that are obviously so and clearly made to make a product or an advertisement interesting or attractive to consumers’. Puffery has an impact on consumer purchase decisions and can mislead a consumer, but there are currently no legal ramifications surrounding its usage.

It has been in use since the 16<sup>th</sup> century case of *Harvey v Young* (1602) 80 ER. 15, 15 (K.B); and its status has not changed much ever since. In this case, the seller stated that a term of years (an estate held for a specified number of years) was worth £150. The buyer paid that amount for it but was later unable to get even £100 for it. He sued for recovery of his money but failed. The court concluded that, as a buyer, he should have been more careful to check the claim, thus making the assertion nothing more than a puff (Preston 1975, p 69).



The current law in Australia with regard to puffery is found in the ACL and common law. The Australian Competition and Consumer Commission (ACCC), which acts as the regulatory body for breaches of the ACL, states that puffery used in promotions does not attract liability for being misleading (ACCC, Advertising and Selling Guide) The ACL itself does not mention puffery. Cases such as *Proctor & Gamble Australia Pty Ltd v Energizer Pty Ltd* (2011) FCA 1347, and *Specsavers Pty Ltd v Luxottica Retail Australia Pty Ltd* [2013] FCA 648, also echo the fact that puffery is not actionable. Details of these cases can be found in Chapter Two, Section 2.2.

Puffery does not attract a legal liability because lawmakers have concluded that the exaggerated nature of the claim makes it clear that the statements made are not to be taken seriously by the consumer and that the claims are at best, mere opinions. Regulators assume that consumers recognize the fact that puffery lacks credibility and thus work on the assumption that puffery messages are not assimilated by consumers (Cowley, 2006, pp 728-734).

This conclusion by lawmakers has its basis in the notion of ‘caveat emptor’, which is Latin for ‘let the buyer beware’ (Preston 1995, p 86). The consumer is expected to exercise due caution upon examination of the product and to make necessary enquiries before purchasing the product. Caveat emptor dates back to the 16<sup>th</sup> century and was first used in the case of *Chandelor v Lopus*, 1603, 79, (ER 3).

In this case, a man paid £100 for a bezoar stone that was believed to have healing properties. The seller claimed that the stone was a bezoar stone, even though this was not true. The buyer sued for the return of the purchase price. The Court of Exchequer held that the buyer had no right to get his money back, saying that the claim about the stone was a mere assertion. The majority of the judges held that the buyer would have succeeded in his claim if he had shown that the seller knew the stone was not a bezoar or that the seller had warranted that the stone was a bezoar. Since the buyer could not prove anyone of these, the buyer’s claim failed. The responsibility for checking the claim was in the hands of the buyer, and the buyer had not done this properly (Preston, 1995, p 35). In the context of puffery, a consumer is expected to know that puffery is not the truth and that reliance on it will be at his/her own peril. Courts assume that buyers are interacting with sellers and would not be fooled by the seller’s claims (Preston 1996, p 29).

Caveat emptor is more easily justifiable when consumers are involved in face-to-face transactions and are able to examine goods prior to purchase. Much has changed, however, in

the way goods are marketed and sold. A sizeable portion of purchasing and marketing has moved from the brick-and-mortar space to the online sphere. Roy Morgan Research states that there was a 12% growth in the online retail sector in 2013, and that 50.3% of Australians had shopped online in the months of April to June 2013 (Bainbridge 2013). Mean value of monthly purchases by Australians grew by 5.8% from 2011 to 2013, and the number of purchases grew by 46.2% (Bainbridge 2013). Three in ten Australians shop online weekly (Ewing 2014) and Australians spent a record \$16.4 billion online in the year 2014, up 9% year-on-year (NAB Online Retail Sales Index 2014). 48% of small and medium businesses and 79% of large business had a social media presence in 2015-2016. 23% of small businesses, 57% of medium-sized businesses and 38% of large-sized businesses had allocated 10% of their marketing budget to social media (Sensis Social Media Report 2016, p 66). According to IAB Australia's Online Advertising Expenditure Report (2017), \$1.86 billion was spent on online advertising in the first quarter of 2017, up 7.2 percent year-on-year.

Online shopping often does not allow a consumer to adequately examine goods prior to purchase. Consumers are faced with advertisements and promotions for products that they are unable to examine or authenticate. There are three types of risk associated with online purchasing: product risk, security risk, and privacy risk (Doolin et.al 2005,). Product risk involves risk associated with product performance, where a product does not function as expected (Bhatnagar et al. 2000; Javenpaa & Todd 1997; Tan, 1999; Vijayasarathy & Jones 2000, cited in Doolin et.al 2005). The lack of opportunity to examine products prior to purchase is one of the factors that contributes to product risk (Tan 1999 cited in Doolin et.al 2005). This makes reliance on caveat emptor as a basis for puffery unfair.

Commerce has come a long way from its humble beginnings, and advances in technology have made the world a smaller place. This means that the seller could very well be sitting on the other side of the globe. This makes it difficult, in the event of breaches of law, when products do not meet specifications or live up to the claims made (Javenpaa & Todd 1997; Vijayasarathy & Jones 2000 cited in Doolin et.al 2005).

This problem is further exacerbated by the usage of puffery. Previous research has shown that puffery does have an effect on consumers and the purchase decisions made (Cowley 2006 p 729; Campbell & Wright 2008, p 72; Jimenez et al 2013 pp 418-439). A full discussion of this is presented in Chapter Two. Puffery usage is justified on the basis that consumers would not believe the claims made (Cowley 2006, p 728 -734). Cowley (2006) argues that lawmakers have this point as the basis of reference when drafting any legislation relating to misleading

practices in consumer law. The fact that ACL does not mention puffery as being misleading is proof of this.

This research proceeds on the basis that disbelief in the claims made does not mean that an impact has not been made on the mind of the consumer. The puffery used in promotions leads to retention of information pertaining to the particular brand and in turn influences the mind of the consumer about the particular brand (Campbell & Wright 2008). There is a high chance that the particular brand is chosen the next time an item is purchased (Cowley 2006). This is precisely why marketers spend millions of dollars on making promotions that contain puffery (Jimenez et al. 2013). Thus, an untruth is allowed to influence the mind of a consumer with regard to purchase decisions while avoiding any form of legal retribution. The question, therefore, is why misleading practice such as puffery should be allowed a free rein, when other forms of misleading practice are curtailed and regulated by the law.

Sections 18, 29 and 33 of the ACL and common law regulate misleading conduct in Australia. Similar types of regulation can be found in countries all over the world. This is discussed in greater detail in Chapter Two, Section 2.2. The ACL states that exaggerations made about a product in promotions do not attract liability for being misleading, unless claims made are verifiable by measurement or calculation (Wolfe & Ferland 2001, p 1).

A claim such as “the best battery in the world” is likely to be considered puffery as it is subjective and cannot be assessed for accuracy. However, a superlative like “our battery lasts five times longer than any other brand” may not be considered puffery, as it is capable of being measured.

What constitutes misleading and deceptive practice is similar in both the brick-and-mortar space as well as the online medium (ACCC, Advertising and Selling Guide). Puffery is not considered misleading or deceptive under the ACL. One conclusion we can draw from this is that puffery is given the same status when it is used in Commerce and E-commerce. The absence of any clear guidelines on this, and no contrary statements existing otherwise, give justification for this assumption.

The problem with this is that online transactions have unique challenges that are not prevalent in the brick-and-mortar space. Some of these challenges include inability to examine products before purchase, higher cost of getting goods replaced, and difficulty in pursuing a remedy against a seller who is from another country (Smith 2000). Thus, the usage of the same laws for both areas would not be fair. It is still uncertain whether the law adequately addresses

all potential threats that a consumer may face when involved in electronic transactions. It is imperative to know whether the law is taking equal strides to keep up with the pace set by commerce and its changing nature. Specific legislation may be required. The security provided by defined laws in the area will give necessary confidence to the consumer. A better understanding can also be reached between marketers and consumers, as both become aware of what is legal and what is not. The present research examines this area of focus, and highlights the need for further regulation of puffery when consumers make online purchases.

The \$13.4 million lawsuit initiated against Red Bull in USA in 2014 is the most striking and a recent example of why puffery should be looked at more carefully. The matter involved an objective representation linked specifically to a characteristic of a product's performance, and was thus alleged to have moved beyond the realms of acceptable puffery. The lawsuit went on to allege that the claim, "Red Bull gives you wings", understood to be puffery, was in fact misleading. The case summary is presented as follows.

*Benjamin Careathers v Red Bull North America, Inc., Case No.1:13-CV-00369(KPF) Wolf, et al. v. Red Bull GmbH, et al., Case No. 1:13-CV-08008 (KPF) (Lexis Nexis 2015)*

A class action was initiated in the United States against Red Bull GmbH in 2013 for misleading practice, breach of express warranty, unjust enrichment, and violations of various states' consumer protection statutes. Benjamin Careathers sued Red Bull for false advertising. Being a regular consumer of the drink for over ten years, he argued that it did not enhance athletic or intellectual performance in any way. He cited evidence in the New York Times Nutrition Reviews and the European Food Safety Authority Journal that indicated energy drinks provide their boost through caffeine alone and not Guarana or any other ingredient.

In order to understand the issue in this case, some background information is required about Red Bull GmbH, its product and promotions. Red Bull GmbH is a supplier of energy drinks from Austria and has been in operation since 1987. Red Bull drinks are sold in more than 169 countries, and over 60 billion cans have been sold so far. As part of its promotional strategy, Red Bull has been using the advertising slogan, "Red Bull gives you wings", and this has become synonymous with its product. This slogan has always been considered as puffery. The advertisements used by Red Bull GmbH often combine the slogan with scenes of amazing stunts and cartoons depicting unbelievable scenarios. This implied and still does imply that Red Bull can help a consumer of the drink achieve the impossible.

The ingredient in Red Bull's drink that is supposed to give an energy boost is the ingredient Guarana. Guarana is a plant named after the Guarani tribe in the Amazon. The tribe used the seeds to brew a drink. Guaraná contains caffeine, the stimulant found in coffee. It also contains a mixture of several other compounds that act together to stimulate the drinker over and above its caffeine content (Myers 2015, cited by Cadden 2015). Guarana is commonly used as a stimulant, to enhance athletic performance and weight loss. The amount put into many health products at present is not sufficient to have any effect on physical performance or performance. Any sort of stimulus created is more likely to come from caffeine extracts and ergogenic herbs such as panax ginseng that are pumped into the product (Myers 2015, cited by Cadden 2015).

Mr Careathers argued that Red Bull's performance-enhancing properties could only be tested by the quantity of caffeine and not the guarana content present in each can. The consumer was paying more to attain a level of performance enhancement that could just as easily be obtained from a cup of coffee, which is a cheaper alternative to the Red Bull drink. "Such deceptive conduct and practices mean that [Red Bull's] advertising and marketing is not just puffery but is instead deceptive and fraudulent and is therefore actionable", the suit said (SBS 2014).

The Court held a hearing on May 1, 2015 and approved the settlement. Red Bull GmbH agreed to pay US\$13.4 million towards compensation for consumers to settle the class action. The company pledged to refund \$10 or \$15 worth of Red Bull products to each drinker who had consumed the drink since 2002, and agreed to amend future advertising (Lexis Nexis 2015). It is argued that this was done to avoid a protracted and costly trial. Red Bull, however, maintained that its promotions have always been truthful (SBS Reports, 2014).

The out-of-court settlement may be indicative of the fact that there may be truth in this matter, and the large payout also hints at efforts to silence the matter from further investigation (Johnson, B 2014). Two years have passed since the settlement was approved, and compensation in the form of either cheques or products have been sent out to all those who have put forward a claim. The downside to these payments is that the amounts paid out were smaller than the sum promised because of the large number of claimants and a fixed amount of money set aside to settle the claims (Johnson, B 2014). There were payments made of \$2-\$3, when the original promise was \$10.

Another disadvantage is that a court has not deliberated on this matter and a precedent confirming those allegations has not been set (Polites 2014). An interesting observation is the fact that recent advertisements from Red Bull GmbH have not changed their tone and claims in any way. A quick look at the most recent Red Bull advertisements on the Internet and television will confirm this. This indicates that, if this issue is not the subject of a legal decision, Red Bull and any other company using puffery is permitted to carry on as they always have, until another legal challenge to puffery usage comes along. This action and settlement is, however, the most far-reaching challenge to puffery usage and the misleading effect it can have. It brings to light the possible risk caused by puffery usage and the consequences of the lack of regulation of it.

Specific laws dealing with the intricacies of puffery are required, and timely amendments must be made to keep up with the changes that are taking place in the way consumers transact and purchase. Investigations via the literature review in Chapter Two, Section 2.2 show the lack of specific legislation that deals with this area. Policy objectives have been examined to determine whether the relevant sections in the ACL that deal with misleading practices are effective in meeting these objectives.

An examination of several case laws that deal with puffery and misleading practice in Australia has also shown that this area is not established. Investigations into the law surrounding the area in Australia have been carried out for the present study to draw further conclusions.

Examination for the present study have also revealed that enforcement actions by the regulatory bodies responsible for regulation of consumer protection, the Australian Competition and Consumer Commission and Consumer Affairs Victoria, are considerable. There is also a self-regulatory system used in advertising. This too, has been examined to see whether it has been achieving fair outcomes for consumers. The findings point to weaknesses in the system that impinge upon consumers being able to obtain remedies satisfactorily. Details of the two-part regulatory system can also be found in Chapter Two, Section 2.3.

The law should be as progressive as the rapid growth in methods of trading. Systems used to regulate the law must keep up with changes, and should be reviewed periodically to determine relevancy and effectiveness. The present study investigates the key components that impact this area, namely the law and the self-regulatory system used by promotional tools in Australia, and consumers and the marketers involved in online sales transactions. The study

mainly focuses on the law, while being based on the overarching field of Marketing. This research will help to bridge the gap between the consumer and the marketer in relation to the avoidance of legalities and the implications of that avoidance.

### **1.3 Research Justification**

This research is important because it helps prevent people from being misled when making purchases online. It sheds light on the need for tighter regulation in the area of puffery, which has till the present day been disregarded being harmless. Such regulation would help to put the consumer on an equal footing with the seller in the online medium.

Research gains justification and credence when it addresses an issue that needs expansion, amendment or elaboration. The findings of such research should offer something useful to society in its progress and development. These are some of the factors that help to determine the far-reaching impact research may possess. Gaps are sought in pre-existing literature to discover areas worthy of investigation (Kothari 2004). These were the factors considered in the formulation of the present research. The area of puffery was chosen because it involves sanctioned usage of untruths without any legal repercussions, despite the fact that previous research has proven that puffery influences purchases. The effect of changes in purchase methods and technological advances have been examined to determine whether the basis on which puffery was tolerated, still exists.

Previous research in the area of puffery and its effect on consumers does exist; however, the effect of puffery in online advertisements has not previously been explored. This is a gap in the literature that thus needs to be addressed. Research has been conducted on the effect of puffery (see Chapter 2, Section 2.1); but the need for puffery regulation in the online sphere has not been investigated. This is the direction taken by the present research. The idea for expansion and possible amendment of this area became an interesting proposition. This research would be in the best interest of consumers, as it would prevent them from being misled. The research also benefits marketers by making the boundaries that determine whether promotions are misleading or accurate much clearer. Marketers can avoid costly litigation; and this in turn, will benefit consumers, as they are not subjected to misleading advertisements that hide under the guise of puffery.

This research hopes to create awareness amongst lawmakers and regulators in regard to the legal lacuna that needs to be filled in puffery regulation. Regulators are those involved in ensuring laws are adhered to, and lawmakers are those responsible for making the laws.

Another aim of this research is to show how the law can take equal strides alongside the progression within society. The far-reaching consequence contemplated is the possible standardization of laws with other countries in the area of puffery regulation. This possible standardization would be beneficial to the legal regulation of trading in light of both online trade and the related globalisation processes of recent decades. The standardization will provide additional security to purchasers and sellers who sit on different sides of the globe. Consumers and sellers alike would find it easier to obtain remedies if the laws were similar. This research is not merely limited to the legal territory but also explores how marketers can market their products.

The fact that the puffery defence is raised repeatedly to combat claims of misleading practices indicates that it does have legal weight in terms of facilitating an escape from liability. The Austlii website shows more than 150 cases, spanning 1990-2016, where puffery has been raised as a defence in Australia (Austlii, Puffery defence cases). This provides marketers with the opportunity to manipulate advertising by using puffery in their promotions. Laws relating to puffery need to be more strictly regulated. The tolerance level for its usage should not be set as high as it has been in the past. Although puffery occupies a small area in the Law of Contracts, its impact is far reaching. Thus, this research can be justified on the basis of filling the legal lacuna. It needs to be considered sooner than later, as the migration of consumers to the online domain is increasing steadily over time. Australia's online retail spending increased to \$14.9 billion for the year to January 2014, or by 11.3% (NAB Online Retail Sales Index, In Depth Report 2014). It increased to \$16.6 billion for the year to January 2015, or by 9% annually (NAB Online Retail Sales Index, In Depth Report 2015) and grew by 13.5% in the 12 months to June 2016 (NAB Online Retail Sales Index, In Depth Report 2016). In year on year terms (March 2017 against March 2016), online sales grew by 9.0% (NAB Online Retail Sales Index, In Depth Report 2017).

### ***1.3.1 Contribution to Legal Theory***

This research contributes to Legal Theory in the following ways.

#### ***1.3.1.1 Questioning the justification of puffery usage in online advertisements***

This research contributes to legal theory by examining the continued usage of puffery and its justifiability as a defence in a misleading practice action, in light of the fact that the circumstances and environment that formerly justified its usage and relevance are rapidly changing. In the current climate, it is very difficult to substantiate a continued usage of puffery.



This research looks at whether there is still a need for granting puffery immunity from litigation. Given the fact that there is an increase in the shift towards online purchases in Australia, this research is timely. The research sheds light on whether the law relating to this area is up to date. It seeks to answer the question whether this archaic concept can continue to have any relevance in the cyber age. It ties in existing research surrounding the area and seeks to update the law. It seeks to provide a case for tightening the laws relating to puffery.

#### *1.3.1.2 Existing research and findings*

- a. The law in Australia still allows for puffery usage in advertisements. Examination of the Australian Consumer Law (found in Schedule 2 of the Competition and Consumer Act 2010) and the Australian Competition and Consumer websites reveals that puffery is not actionable in Australia. The Advertising and Selling Guide (2014, p 7), published by the ACCC, clearly states this point. The fact that there are no sections that impose liability on puffery usage in the Competition and Consumer Act (2010, Chapter 2, Part 2-1) further confirms its status of immunity. The common law cases examined in Chapter Two also confirm this. Case law on misleading practice has always sought to establish whether the line separating puffery and the misleading practice is crossed.
- b. A comparative study of the legality of puffery in countries around the world was conducted for the present study, to examine whether the position with regard to puffery regulation was similar to the position in Australia. It was also done to establish the viability and feasibility of proposing changes for Australia, and whether this has been done before in other countries. The results show that puffery is unlawful in Turkey, and that the 22 countries examined have varying levels of regulation when dealing with puffery usage in advertisements. Details of the comparative study can be found in Chapter Two, Section 2.2.
- c. Research in the area of puffery has focused on whether it affects consumers' purchase decisions, and this is evident from the research findings outlined in Section 2.1 of Chapter Two.
- d. Research has also been conducted for the present thesis on the difficulties posed for online consumers. This can be found under the sub-heading Online transactions in Section 2.4 of Chapter 2.
- e. Previous research has also been carried out with regard to the test to be used for determining the standard of care in assessing whether conduct is misleading (Kapnoullas & Clarke 2008).

### ***1.3.2 Questioning the viability of Caveat Emptor as the basis for puffery usage in the online medium.***

Puffery is considered to be justified because the claims made are so highly exaggerated that consumers will not believe the claims. The exaggerated claims are made to make a product more attractive to consumers or to catch the attention of the consumer, and it is understood to be no more than that. No reliance is placed on such exaggerations (James 2017, p 397). Thus, the onus is on the buyer to be careful and make necessary enquiries and investigation before making the purchase. This means that caveat emptor (let the buyer beware) applies (James 2017, p 387).

Caveat emptor, a principle believed to have originated about two thousand years ago from ancient Rome, is based on the idea that the buyer should be cautious before making a purchase (Nicholas, cited in Reitz 1989, p 249). This implies the ability to examine the goods before the purchase. No warranties are implied as to the goods, and the only circumstance where the maxim would not apply would be if the seller had made a misrepresentation about the product. The seller is under no duty to communicate to the buyer the existence of defects, even hidden ones, in what he is selling (unless the seller somehow implies that such defects do not exist). In such a case, the seller could be sued in the Tort of Deceit (Goode 1995, p 188). This was brought out in a case involving the sale of a stone that was claimed to be a Bezoar stone having curative properties by the seller. The case in question is *Chandelor v Lopus* in 1603, 79, ER 3, and is one of the earliest examples of this concept being used and illustrated in England (McMurtrie 1887, pp 191-195). The issue in that case was whether falsely represented goods were actionable as deceit. It was held that a false representation of goods by a seller is not actionable unless the seller had made a warranty at the time of sale. The case emphasised the importance of the buyer being cautious before making purchases. The buyer should make reasonable enquiry and examination of the product prior to purchasing it.

Prior to this case, breach of warranty claims where the plaintiff was deceived into the bargain were not considered actionable under Contract law, since performance of the contract had already taken place. They were considered as trespass to goods under Tort Law (Teevin, cited in Moglen, 2014). These actions emerged at the end of the 14th century. The emergence of the doctrine of caveat emptor remedied this situation (Teevin, cited in Moglen 2014).

This research questions the viability of using caveat emptor as a justification for puffery at a time when commerce is fast leaving the brick-and-mortar space behind and moving into a

realm where it is even more difficult for a buyer to be aware. This is especially important because placing the burden on the buyer has been systematically removed by legislation under consumer protection law over the years in order to bring the consumer on to a more level playing field with the seller. One example is s.71(1):

*Where a corporation supplies (otherwise than by way of sale by auction or sale by competitive tender) goods to a consumer in the course of a business, there is an implied condition that the goods supplied under the contract for the supply of the goods are of merchantable quality, except that there is no such condition by virtue only of this section. a) as regards defects specifically drawn to the consumer's attention before the contract is made; or (b) if the consumer examines the goods before the contract is made, as regards defects which that examination ought to reveal (Trade Practices Act 1974, No. 51, 1974).*

Another example is s.18, which states that, when there is a contract for the sale of goods, by description there is an implied condition that the goods shall correspond with the description. If the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if all the goods do not also correspond with the description (Goods Act 1958).

An overview of the progression of trade trends and caveat emptor in Britain and Australia is now provided to trace the diminution in the usage of caveat emptor over time (Consumer Law Resource Centre). The evolution of Consumer Protection legislation proved to be a major factor for this slow decline, as its aims were contrary to the common law principle (Goldring et.al 1998, p 6).

As society progressed over time, the importance of the maxim began to fade. The Industrial Revolution from the 18<sup>th</sup> Century saw the emergence of mass manufacture of products, which meant that there was a higher chance of consumers being misled. This was because the consumer was no longer able to deal directly with the manufacturer of the goods, and opportunities for examination of goods before purchase slowly reduced. The law soon recognised that it was not very just to apply the principle of caveat emptor.

The **Sales of Goods Act of 1893** in Britain attempted to shift the burden posed by caveat emptor to the seller slowly, via the introduction of implied warranties on seller's duties. One example is Section 14(i):

*Where the buyer, expressly or by implication, makes fitness known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose (Sales of Goods Act 1893).*

Another example is Section 15(2):

*In the case of a contract for sale by sample—*

*(a) There is an implied condition that the bulk shall correspond with the sample in quality:*

*(b) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample:*

*(c) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample (Sales of Goods Act 1893).*

This clearly shows that the burden of the consumer being aware was reduced by imposing upon the seller duties to ensure that the goods sold complied with certain standards and expectations. Only examinations by the consumer that would reveal defects placed a burden on the consumer. Proof of reliance on the skill and knowledge of the seller also helped to shift the blame from buyer to seller.

The revolution that occurred in trading methods precipitated the need for further regulation in the area. The further development of transportation systems meant that manufactured goods were able to reach greater distances. Advances in the manufacturing industry meant that goods were capable of being produced in larger quantities and at greater speed.

Gaps appeared in the law as methods of manufacture changed. For example, the consumer did not always buy the products from the manufacturer. They could also purchase from a wholesaler, distributor or a retailer. In such cases, their rights against the manufacturer

were limited or non-existent as they did not have a contract with the manufacturer. These gaps in the law were filled by common law. The famous case of *Donoghue v Stevenson (1932)* All ER Rep 1; [1932] AC 562, in the Tort of Negligence, was ground breaking in that it made manufacturers liable to the person who consumed their product, irrespective of whether that consumer had a contract with them or even purchased that product from them.

In this case, Mrs Donoghue suffered from stomach poisoning which resulted from consuming ginger beer from a bottle manufactured by Stevenson but sold by a retailer. The bottle contained the decomposed remains of a dead snail. She had no contract with the retailer as her friend had purchased the drink for her and thus her connection with the manufacturer was also non-existent under Contract Law. The courts held that a manufacturer owed a duty of care to their consumers if it could be shown that they could reasonably foresee harm to the consumer by their actions. The test that had to be satisfied was the Neighbour principle enunciated by Lord Atkin (UK Law Online). The landmark case helped to shift the heavy burden of caveat emptor from the consumer to the manufacturer.

In the 1950's-60's awareness of consumer rights rose. The Australian Consumer Association was founded in 1959 to provide greater bargaining power for consumers. The **Trade Practices Act 1974** was the next milestone in protection for consumers, as it provided a broad range of remedies for consumers that included injunctions and fines. Part V, Divisions 2, 2A dealt with conditions and warranties in consumer transactions. Division 2 protected consumers when they acquired goods or services. It implied various conditions and warranties into the transaction, whether this is a contract for sale of goods or the supply of services. Some of the terms implied by the contract were that the supplier gave the consumer clear title to the goods (Section 69), the goods sold were to be of merchantable quality [(s 71(1)], fit for the purpose for which they were purchased [(Section 71(2)], and corresponding to the sample (ss 70, 72) (Summary of the Trade Practices Act 1974, pp 47-48). A seller was not able to exclude, restrict or modify the statutory conditions and warranties (s.68) (Summary of the Trade Practices Act 1974, p 49). A consumer could also bring an action for damages against a manufacturer or importer if: the goods were not reasonably fit for the purpose they were purchased for (s. 74B); the goods did not correspond to the description on which the purchase was based (s. 74C); the goods were not of merchantable quality (s. 74D); or the goods supplied by reference to a sample did not correspond with the sample (s. 74E) (Summary of the Trade Practices Act 1974, p 51).

A detailed discussion of other legislation that was passed by parliament in line with consumer protection can be found in Chapter Two. A brief mention of the Australian Consumer Law is made here for the sake of this discussion relating to the justification of caveat emptor. Australian Consumer Law is found in Schedule 2 of the Competition and Consumer Act 2010. The Act unifies consumer protection law across all states of Australia and replaces the Trade Practices Act 1974 (Australian Consumer Law website). The ACL has the same protections given to consumers by the Trade Practices Act 1974 and expands it further in certain areas.

Section 18 of the ACL prohibits a person, in trade or commerce, from engaging in misleading or deceptive conduct. Section 29 deals with specific representations made about products or services that turn out to be untrue (James 2017, pp 406-407). Section 21 places a ban on unconscionable conduct exercised on consumers by businesses, and acknowledges the fact that bargaining strengths between the consumer and seller are not equal. It thus seeks to protect the consumer (James 2017, pp 399-400). Section 23 makes unfair contract terms in consumer contracts void (James 2017, pp 401-402). The ACL provides consumer guarantees for goods or services, and this is similar to The Trade Practices Act 1974. Sections that deal with acceptable quality (s. 54), fitness for purpose (s.55), and descriptions made about products (s.56), are just some examples (James 2017, p 411). The ACL also sets out law on product safety and a regulatory framework that applies nationally (James 2017, pp 413-414). The manufacturer's liability for defective products is reiterated in the ACL, as was done in the Trade Practices Act 1974 (James 2017, pp 415-416). Information standards are imposed on information supplied by sellers to consumers in their packaging or promotion of products (James 2017, p 415). This legislation further diminished the burden of caveat emptor on the buyer as protection afforded to consumers expanded.

The advent of globalisation resulted in goods and services being produced, marketed and distributed to a global market. This meant that that the manufacturer/seller and consumer could be sitting in different parts of the globe. The gradual shift to Internet shopping brings further challenges for consumers. Consumers are no longer able to examine products before purchase in cyberspace, and can only base their decisions on the advertisements they are exposed to. Return and exchange of products can take a longer time. Security of payment is a concern for consumers, and locating the seller in the event of a breach of contract can prove more difficult. Deceptive advertising, poor quality of products, overcharging, privacy, and difficulty of redress, are some of the other problems (Patel & Lindley 2001; Cho et al. 2002; Wentworth 2003; Consumer Affairs Victoria, 2004; Hilliard & Nordquist 2005 cited in Huong & Coghill

2008, pp 5-17). Consumers are not in an equal position with sellers and thus need to be protected.

The retailer of mass produced goods has the advantage in terms of resources, information and technical knowledge. The expectations on which the theory of caveat emptor is based are that the purchaser will be able to consider the risk of purchasing sub-standard goods and is able to fully enquire about the good before purchase. This is not really the case anymore, especially in online sales (Consumer Law Resource Centre). Reliance is placed on details found on websites, and in online advertisements or reviews, and this can cause problems if there are inaccurate or deceptive practices being used.

Despite the decreased usage of caveat emptor in general and the shifting of the burden from buyer to seller as outlined above, a similar result is not seen in the case of caveat emptor and puffery. Puffery still stands justified and rests on the premise of caveat emptor. The present research will seek to prove that caveat emptor should not be used to substantiate the usage of puffery in the online medium because the nature of the medium itself and the way the world is trading has made its use impractical and unjust.

A closer examination of Australian Consumer Law in relation to misleading or deceptive practices will help to show why puffery should not rest on the basis of caveat emptor.

**Section 18 of ACL** states,

*1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*

To determine if the section has been contravened, three requirements must be satisfied (James 2017, pp 394-398). The requirements are as follows:

*1. The business has engaged in conduct.*

A business engages in conduct if it makes a statement or a claim or a promise, perform an action or refuses to do any of these things. *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1989) 89 ALR 539 is the case that supports the proposition that even silence can amount to conduct.

*2. The conduct was in trade or commerce.*

Trade or commerce is defined in **Section 2 of the ACL** as meaning:

*(a) trade or commerce within Australia;*

*(b) trade or commerce between Australia and places outside Australia and including any business or professional activity.*

*3. The conduct was misleading or deceptive.*

The Court will use an objective test to determine this and ask the following two questions:

- i) At whom the conduct is directed to?
- ii) Would those persons (including the gullible, the intelligent and the not so intelligent, the well-educated and the poorly educated within that class) have been likely to be led into error by the conduct? This is the qualification given in *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177).

The second test implies that the person at whom the conduct is directed need not know too much. Thus, it may be easier to mislead the person. At this point, a brief discussion on the standard of knowledge expected of a consumer will give some understanding as to the approach taken by courts in this area in the present day.

The reasonable man test is used to determine standards of action in most common law actions. The 'reasonable man' is one who 'has the knowledge and average amount of competence of the ordinary layman, or if he claims certain skills, the amount of competence commensurate with the particular trade or calling' (Bradbury 1976, cited in Clarke 1990).

This standard required the foresight and caution of the ordinary or average prudent man, or 'the man on the Clapham omnibus' as put forward by Greer LJ. Others such as Baron Bramwell in the case of *Hall v Brooklands Auto-Racing Club* [1933] 1 KB 205, however, stated that 'the reasonable man' "should have the agility of an acrobat and the foresight of a Hebrew prophet." The differing opinions put the level of the reasonable man as one who had more than just average understanding. The movement from the standard of the reasonable man to the standard as stated in *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177) can be traced back to the Trade Practices Act 1974 and subsequent cases that followed its introduction.

With the introduction of the Trade Practices Act 1974 and its focus on consumer protection, Federal Court judges began to support a standard of expected knowledge to be lower than that of the reasonable man standard. Section 52(1) states that a corporation shall not, in



trade or commerce, engage in conduct that is misleading or deceptive. This section, which has now become Section 18 of the ACL, was one of the main sections that dealt with misleading and deceptive conduct. Franki J in *Annand & Thompson Pty Ltd v Trade Practices Commission* (1979) 25 ALR 91, said:

*'The question of whether conduct falls within s 52(1) is to be determined by its likely effect on a person, not particularly intelligent or well informed, but perhaps of somewhat less than average intelligence and background knowledge, although the test is not the effect on a person who is, for example, quite unusually stupid.'*

In the case of *Taco Company of Australia Incorporated v Taco Bell Pty Ltd* (1982) ALR 177, the High Court explained that there is a two-stage test in determining whether conduct is misleading or deceptive. Firstly, it is necessary to identify the target audience (relevant section of the public) for the alleged misleading conduct; and secondly it is important to determine whether that target audience would be misled by the alleged misleading conduct. This target audience would include *'the astute and the gullible, the intelligent and the not so intelligent, the well-educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations.'*

The High Court of Australia gave approval to this approach that recognizes the rights of the inexperienced and gullible consumer. The same tests and standards were applied in recent cases involving breaches of Section 18 ACL. *Google Inc. v Australian Competition and Consumer Commission* (2013) 249 CLR 435, *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liquidation)* (No 2) [2017] FCA 709, and *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2011] FCA 1254 ([www.austlii.edu.au](http://www.austlii.edu.au)), are three such examples. There is a general consensus that expectations of knowledge and standard are set lower than the reasonable man standard. A contravention of Section 18 can occur if it can be shown that a small percentage of the target audience is likely to be misled (James, 2017, p 396). The test takes on a more subjective slant compared to an objective assessment. It pitches the knowledge expectation at a level that may be slightly lower than the person whose actions are being examined. This makes liability under the section easier to establish, as the law is trying to protect vulnerable consumers.

Thus, if Section 18 has made it relatively easier to prove misleading conduct, and puffery still stands outside its ambit, it can only imply that ads need to be so exaggerated that even the not so intelligent person would not be misled. This is where we need to examine whether ads

can pose a challenge to a person of average intelligence. This will help to explain whether caveat emptor is harder to justify given the different techniques used by marketers to cloud the truth.

### ***1.3.3 Impact of marketing techniques on caveat emptor***

Jones (2014), in her article, ‘Fat free and 100% natural: seven food labelling tricks exposed’, provides us with the following information:

1. The colour of food packaging can influence our perceptions of how healthy a food is.
2. A recent study found that consumers’ perceptions of two identical chocolate bars were influenced by the colour of the nutrition label. Despite the identical calorie information provided, people perceived the one with the green label to be healthier.
3. Another tool of savvy food marketers is the use of “ticks” and “seals” that we subconsciously process as indicating that the product has met some form of certification criteria. A recent study found that nutrition seals on unhealthy food products increased perceptions of healthiness among restrained eaters.
4. Food packaging often contains words that imply that the food contains certain ingredients, or has been prepared in a way, that makes it healthier (or at least better than similar foods), but many of these words – such as “healthy” or “natural” – have no legal or formal meaning. This allows manufacturers to avoid allegations of breaching advertising or labelling regulations.
5. Unfinished claims tell us the product is better than something but not better than whatever that is. For example, Fountain’s ‘Smart Tomato Sauce’ claims it has 25% less added salt (than its regular tomato sauce). The Heart Foundation defines low-salt foods as those with less than 120mg per 100g; Fountain’s Smart tomato sauce has 410mg per 100ml.
6. A common strategy is to list a claim that is, in itself, completely true – but to list it in a way that suggests that this product is unique or unusual (when in reality it is no different to most foods in that category). For example, Bega Stringers Cheese claims that it is 100% natural and has no artificial colours or flavours. Most standard cheeses (including many packaged products such as cheese slices) also contain no artificial colours or flavours.
7. Usage of ‘No added’ descriptors. Berri Super Juice proudly, and truthfully, claims it “contains no added sugar”. A 200ml serve of this super juice contains 25.8g of sugar.
8. Healthy brand names. Healthy sounding words are not only used as “claims” but are often used as brand names. Brand names are often seen as a key descriptor of the nature of the

product. Research has found that people rate food as healthy or unhealthy based on pre-existing perceptions of the healthiness of a product category or descriptor, particularly among those who are watching their diet, and may thus select the unhealthier option based on its name or product category.

The words and colours used tend to portray the product in a much better light than it is in reality. The techniques are deceptive and play on consumer susceptibilities. They encourage assumptions to be made about the products. “No added sugar” tends to imply that no sugar has been used in the preparation of the product, but in reality, the product already has an amount of natural sugar or fruit sugar in it. The words used like “healthy”, “smart” and “natural” have no real means of measurement or comparison and thus border on being puffery. These techniques only help to blur the line between puffery and misleading practice, and thus put the consumer further away from the truth. In the world of mass-produced items and multitudes of products and varieties available, it becomes harder for the buyer to beware. This tells us that established advertising techniques make it difficult to discern the truth of advertisements and can mislead consumers. The continued usage of puffery will only put the establishment of what is the truth about a product further out of the grasp of a consumer.

Chonko (1995) lists other advertising techniques that are employed by marketers that can influence a consumer unduly.<sup>25</sup> The usage of certain words or particular ways of wording claims can lead a consumer to be unsure about the status and quality of the product they are intent on purchasing. Chonko gives the following examples and brief analyses of such claims as follows:

1. Weasel claim - In such claims, a modifier is used in the advertisement that practically negates the claim that follows it. For example, a claim like “\_\_\_\_\_ leaves dishes virtually spotless.” The word ‘virtually’ is subject to interpretation. It can also mean that the product may leave some spots behind even after cleaning.
2. Unfinished claim - The statement in the advertisement claims the product is better than other products but does not complete the comparison. For example, in a claim such as, “\_\_\_\_\_ gives you more”, the implication is that the product provides you with extra benefit, but since there is no basis on which this comparison can be judged, it can also mean that the product gives the consumer a mere 1% extra. It also does not really tell a consumer what the product gives more of. The claim is made by banking on the fact that a consumer will be taken in by the mere fact that the product gives more than other products do.

3. We're different and unique claim – In claims such as this, uniqueness of the product is to be interpreted as superiority by consumers. For example, a claim such as, “There's no other \_\_\_\_\_ like it”, can mean a number of things. It could mean that the product is the only product that does not use a particular component in its manufacture. This does not necessarily mean this makes it better than other products. The claim of it being unique could also hide the fact that it is more expensive because of its unique nature.
4. The water is wet claim - A descriptive word is used about the product that is true for any brand. For example, for a claim such as, “The natural beer”, the objective here would be to impress the consumer about a feature that is in common with any other brand. Highlighting the fact seems to imply that other products do not share the same characteristic that this product possesses.
5. The 'so what?' claim - A claim made that is true but provides no real advantage. For example, a claim such as, “Strong enough for a man but made for a woman”, attempts to show that the product has a higher degree of strength, but in reality, is merely sexist and does not mean that anything is really significant about the product despite the comparison made.
6. Vague claim - A claim made that is unclear and uses words that are colourful but meaningless. For example, in claims such as, “For skin like peaches and cream” or “\_\_\_\_\_ makes you feel heavenly”, there is no real basis for comparison, as the claims do sound nice but the consumer has no way of really knowing what the claim will actually be like as per the claims made. The reality of having skin like peaches and cream may not be something anyone would actually want. The positive image of “heaven” puts the product in a better light, but in reality, no one knows what heaven feels like.
7. Endorsement or testimonial – In this type of advertisement, there is usage of a celebrity or expert who lends his or her stellar qualities to the product or business, for example, in tennis champion Novak Djokovic's endorsement of ANZ bank. Although there is no real connection between a sports icon and a financial institution in terms of their area of expertise or field they are involved in, the usage of such a prominent and highly ranked player seems to cast the implication that the financial institution that endorses him is also highly ranked and bankable.
8. Scientific or statistical claim - Usage of scientific proof or experiment, specific numbers or mysterious-sounding ingredient. For example, in a claim such as, “\_\_\_\_\_ contains a sparkling drop of Retsyn”, consumers can have a better impression of a product because it claims to have an ingredient about which the consumer may have very little or no

knowledge. The consumer may conclude that the addition of that ingredient or larger quantities of its usage should mean that the product has stronger potentialities.

9. Compliment the consumer claim - A statement that flatters the consumer. For example, in a claim such as, “The lady has taste”, the consumer is complimented for having made the product his/her choice. This indirectly tells us about the superiority of the product but often does not highlight what exactly is great about the product in comparison with other products.
10. Rhetorical question – This is where the advertisement demands a response from audience. For example, a claim such as, “Shouldn’t your family be drinking\_\_\_\_\_?”, seems to imply that the more discerning consumer should be purchasing and partaking in the product because the product is superior to other products.

An analysis of Chonko’s examples of marketing techniques above shows us that almost all of these techniques, except examples 7 and 8, sit within the realm of puffery. They have all the common characteristics of puffery. There is no means of ascertaining such claims or statements, and they show the product in a better light when compared with other products. They are exaggerations meant to influence a sale. A consumer faces claims like this often. Marketers use these techniques to try and influence a consumer by such persuasion tactics, which can range from mild to very strong intensity. The subtler ones also border on puffery. The line that separates puffery from misleading practice becomes harder to gauge. This makes placing the burden of caveat emptor on the consumer a very heavy one. These marketing techniques make it difficult for a consumer to have an accurate estimation of a product. Furthermore, as mentioned earlier, an online purchaser has an onerous task, as the goods to be purchased cannot be examined to determine accuracy of claims made. Coupled with marketing techniques such as those described above, it becomes even more difficult to justify usage of caveat emptor as the basis for puffery usage.

The cases found within Section 2.3 of Chapter Two highlight the large number of cases involving misleading conduct caused by usage of some of the marketing techniques above.

#### ***1.3.4. Answering the question whether the usage of puffery is an ethical marketing practice***

This research contributes to marketing theory by determining whether marketing that utilizes puffery is ethical. Ethical Marketing is defined as the basic set of principles and values that govern the business practices of those engaged in promoting products or services to consumers. Sound marketing ethics are typically those that result in or at least do not negatively impact

consumer satisfaction with the goods and services being promoted or with the company producing them.<sup>26</sup> The present research hopes to show that the usage of puffery, especially in the online medium, will in no way promote ethical marketing. Given the fact that puffery presents an exaggerated version of the truth of a product, it serves to entice interest and influence the mind towards a purchase. A consumer who may not be able to identify the extent of the exaggeration can be misled by the puffery used. Marketing techniques that seek to hide the truth about a product and place it in the area of puffery cannot be said to be ethical.

Laczniak (2012) states that ethical issues in marketing have existed for a long time, but an analysis of the area has only begun to develop in the last 40 years. There are clear standards of proper behaviour agreed upon by marketing practitioners. For example, members of MAANZ (Marketing Association of Australia and New Zealand) are committed to observing ethical conduct that includes:

1. Avoidance of false and misleading advertising;
2. Rejection of high pressure manipulations or misleading sales tactics;
3. Avoidance of sales promotions that use deception or manipulation.

The emerging relationship paradigm in marketing is that there is a need for marketers to incorporate ethical and social considerations into their marketing (Morgan & Hunt 1994 p 34). Morgan & Hunt (1984) comment that, since trust forms an important facet in a relationship commitment, there is a growing emphasis on ethical and socially responsible behaviour in current marketing thinking.

Kotler (1997) has long suggested that organizations adopt the “societal marketing” perspective and focus on consumers, other important groups or stakeholders as well. According to Kotler, the societal marketing concept “calls upon marketers to build social and ethical considerations into their marketing practices” (Kotler, 1997, p 28).

Unethical advertising is often just as effective as it is unethical. Since unethical behaviour is not necessarily against the law, there are many companies who use unethical advertising to gain a competitive advantage. A case in point would be *Gillette Australia Pty Ltd v Energizer Australia Pty Ltd* (2002) 193 ALR 629, where there was the unethical promotion making a comparison of two products that were not in the same category and making a claim of superiority based on that. The advertisements put up by Gillette Australia Pty Ltd claimed that their Duracell batteries lasted four times longer than the Eveready batteries manufactured by Energizer Australia Pty Ltd. It was found that the comparison was made between their alkaline

batteries and zinc-carbon batteries from Energizer Australia Pty Ltd. Alkaline batteries normally last four times longer than zinc carbon batteries. Their Alkaline battery did not last four times longer than the comparable Alkaline battery from Energizer Australia Pty Ltd. It was a clear example of unethical advertising and misleading practice. The two lawsuits, *Benjamin Careathers v Red Bull North America, Inc.*, Case No.1:13-CV-00369(KPF) and *Wolf, et al. v. Red Bull GmbH, et al.*, Case No. 1:13-CV-08008 (KPF) 30, also represent a challenge to usage of puffery as an unethical way of marketing products that could mislead consumers.

For companies looking to improve the image of a brand and develop long-term relationships with customers, this kind of unethical behaviour can quickly lead to bad consequences. Radford (2003, pp 38-39) complains that the use of puffery is a problem in the media in general as well as in advertising: “Meaningless words are not simply a nuisance, they are a form of mental and visual clutter”.

Contributors to marketing theory give us a better idea as to what are the guideposts used by marketers. Kotler (2007), in his article, ‘Ethical lapses of marketers’, states that a second view of the marketer’s goal is to produce more profits for company shareholders in any legally sanctioned way (Kotler 2007 pp 153-158, cited in Sheth & Sisodia, 2007). Gini, Alexei and Marcoux, M (2009) postulate that violations of ethical ideals of society are common in businesses but they are not necessarily violations of business principles. They argue that, as long as a company does not transgress the rules of the games set by the law, it has the legal right to shape its strategy without reference to anything but its profits. Chonko (1995) argues that the continued use of puffery in mass media proves that advertisers deem it effective in obtaining reliance and altering purchase decisions of a substantial portion of the public.

Marketers struggle to find ways to differentiate products that consumers see as having few real differences. As a result, the temptation for marketers to make statements about products that are considered as puffery has increased (Preston, 1996). Usage of puffery is justified, and since it is, legal marketers also feel that no wrong is being committed. Profit is the key factor. We still find many advertisements in Australia using puffery. An example is Eclipse Mints, with the advertisement that a person can become so much better-groomed and fresher looking just by chewing their mints. Another example is Ice Break Coffee, which seems to suggest that a bottle of the iced coffee is worth the risk of jumping onto a speeding truck just to grab the coffee. Red Bull continues with its ads claiming that its product can ‘give you wings’ despite the challenge to its claim. This trend continues under the guise of creative

marketing and successful promotions. The continued usage of puffery is justified by corresponding increases in profit or at least the possibility of it.

Ethical marketing has many advantages. If a company makes an effort to advertise more ethically, it reflects positively on every area of that business. Companies can use ethical marketing as a way to develop a sense of trust among their customers. Anything that reduces trust in the sales relationship can negatively influence that relationship. Trust is seen as one of if not the most important component of a successful buyer-seller dyad (Crosby, Evans, & Cowles, 1990). Credibility is an important element for establishing trust during the first meeting between a salesperson and prospective customer. In the case of online sales, the first meeting is when the consumer views the advertisement and that forms the connection with the seller. If a product lives up to the claims made in its advertising, it reflects positively on the entire company. It can make the consumer feel like the company is interested in the quality of the products and the value they provide customers.

Ethical marketing practices lead to more sales and long-term sales relationships with satisfied customers (Strutton, Hamilton & Lumpkin, 1997). Ethics, however, resides in a grey area, with many fine lines and shifting boundaries. For most companies, the simple knowledge that they are doing the right thing will not be enough of a motivating factor. If ethical marketing proves to be cost-prohibitive, many companies will abandon the effort.

Can it then be said that a company is being ethical while it still dabbles in puffery that has been found to be contributing to misleading practice? The present research will help answer this question and make the boundary of the area clearer. Ethical marketing will have one less grey area with which we have to contend. The advantages it will bring for consumers will be considerable, and marketers too will benefit from better knowledge about an area that has the potential of landing them in costly litigation.

## **1.4 Research Questions**

The next step after discovering an area worthy of investigation and finding justification for the research is the essential step of coming up with the research questions that form the basis upon which the whole research rests. The following questions were formulated for this research.

### ***1.4.1 Primary Research question***

***Is the current regulation of puffery in online advertisements adequate?***



Answering the primary research question will help draw conclusions about whether any sort of change or amendment is needed in the area. This is the focal point of this research.

#### ***1.4.2 Subsidiary research questions:***

***1. What is the nature and extent of puffery regulation in online advertisements?***

***2. How effective is the regulation of puffery in online advertisements?***

The primary question is supported by the subsidiary questions. These questions, when answered, will provide the necessary evidence as to where the law currently stands with regard to puffery in online advertisements, and how far reaching those regulations are. The crucial question, as to whether the law is keeping abreast changes in promotional trends and providing adequate protection, can be answered by addressing these questions.

Investigations into the policy objectives of the relevant Acts as well as examination into case law in the area have been carried out in the present research to answer these questions. Other regulatory efforts and consumer experience were probed, via qualitative and quantitative methods of research. The marketer's perspective was deduced via case reports and literature review so as to present balanced findings.

All investigations made are based on existing theory and findings relating to puffery in Australia.

### **1.5 Research methodology**

This thesis employs a mixed methods approach that uses both Qualitative and Quantitative methods to answer the research questions. Secondary research in the form of literature review is first embarked upon. This is then followed by Focus group sessions and an online Survey to elicit necessary responses. An analysis of the responses is then carried out to draw conclusions. Details of the methodology are found in Chapter 3, findings and analysis in Chapters 4 and 5, and discussion and conclusions are found in Chapter 6.

## **CHAPTER TWO**

### **2.0 Introduction**

This chapter deals with the literature reviewed for this research. Six components were identified as areas that required investigation based on the Research Questions. The six components were determined on the basis of their connection to the central focus of this research. The components identified were Puffery, Legal Framework, Regulatory Bodies, Online Transactions, Theoretical marketing underpinnings, and Consumers. Previous research on puffery and characteristics of puffery are covered under the component Puffery. The different forms puffery can take are also looked at. The statutes and common law cases that regulate the area of puffery and misleading practices are the next area of focus. This falls under the component of Legal Framework. The regulatory bodies such as the ACCC, Consumers Affairs Victoria, and the advertising self-regulatory bodies are the next to be looked at to gain more insight about the Regulatory Bodies component. The functioning of these bodies, their effectiveness, and actions taken by them are examined. As this research focuses on Online Transactions, the next area of focus in this chapter is the various methods of online purchasing and the challenges posed by them. When we discuss puffery, it is equally important to examine those who use it. This brings us to the next component, Theoretical Marketing underpinnings. This component looks at motivations behind advertisers in employing puffery in their promotions to gain an understanding of the perspectives of marketers on puffery usage. Consumers are the ones that are exposed to puffery in promotions, so this important group is the focus of the last part of this chapter. The literature reviewed has examined what was expected of consumers in terms of knowledge and understanding of puffery. The six components investigated provide important insights into the focus and emphasis of the further steps to be taken in this research.

### **2.1 Puffery**

Puffery is the term that denotes the exaggerated claims made by marketers and advertisers about their products in the process of promoting them (James 2017). Puffery stems from the term, Pyffan, which means to swell or seem to swell as with pride or air (Hoek & Gendall 2007). In general, puffery is a nonfactual statement that can be proven neither true nor false, an opinion (Lazer, cited in Toncar & Fetscherin 2011). It is usually characterized by the usage of superlative terms such as “better”, “best”, “greatest”, and “finest”. Puffery is generally not considered deceptive advertising because it is so exaggerated that no reasonable consumer

would take the claims literally (Browne, Hale & Cosgrove 2012). Browne, Hale and Cosgrove (2012) have found that the defence has its origins as far back as 1602 in the case of *Harvey v Young* (1602) 80 Eng. Rep. 15, 15 (K.B.). The law has always allowed the usage of puffery without fear of repercussion.

Advertisers try to make their products as attractive as possible and thus use puffery to sell their products. Puffery occurs when there is usage of opinions and exaggerated statements. The information is not factual and not intended to be. The following are examples of usage of puffery in advertisements:

“Red Bull gives you wings.”

“Gillette - the best a man can get.”

Puffery can involve usage of weasel words. A “weasel word” is used to make a claim look legitimate to the casual listener or reader but it really proves to be meaningless. For example, words such as “this product will help control acne” are not a claim to actually stop or cure acne. The words “help” and “control” are weasel words. Other commonly used weasel words include: “acts”, “works”, “can be”, “up to”, “as much as”, “refreshes”, “comforts”, “fights”, “looks like” and “tastes like” (Econedlink 2013). It is important at this stage to determine what amounts to puffery so that we understand the boundaries within which it operates.

Puffery involves statements that are not comparatively rated. This means that they do not relate to claims that compare products on a basis where the superiority is provable by evidence. An example that can be cited here to show what is not puffery is that of an advertiser saying that a particular brand of battery lasts five times longer than others but is not able to back up the claim with any proof. Puffery does not relate to specific attributes of a product and is not subject to measurement (Preston 1996, p 6).

The average consumer must be able to see easily that the claim is an exaggeration. Puffery is subjective, whilst false advertising is made up of statements that are objective. In *Castrol Inc. v Pennzoil Co* (1992) Civ.A.No.92-1364, the United States Court of Appeals adopted these words: “The puffing rule amounts to a seller's privilege to lie his head off, so long as he says nothing specific.”

When advertising merely states that one product is superior in general terms, it is not actionable. Descriptions of specific or absolute characteristics of a product, however, are actionable (Preston 1996, pp. 5-8).

In *Cook, Perkiss and Liehe, Inc. v. Northern California Collection Service Inc.*; *Sacramento Valley Board of Trade Inc* (1990) 911F.2d 242 the United States Court of Appeals, Ninth Circuit held: “We have recognized puffery in advertising to be claims which are either vague or highly subjective.”

Potentially misleading advertisements that hide under the cloak of untouchability worn by puffery have a free reign to continue misleading the customer. One problem with this is that previous research in the area has already proven that puffery does affect the mind of the consumer and influences their decisions when they purchase products. The following are examples of previous research carried out in this area.

Researchers like Olshavsky and Miller (1972), Anderson (1973) and Olson and Dover (1979) found ample evidence that verbal puffery influences post-trial product evaluations. The research carried out by these researchers proves that puffery does make a product more attractive and helps to make it stand out when compared to other products. Consumers are not only influenced by actions or what can be seen in an advertisement but also by what is said.

Another finding is that puffery is believed by a substantial number of consumers (Rotfeld & Rotzoll 1980; Kamins & Marks 1987). Toncar and Fetscherin (2011) share the same view. The conclusions drawn from these researches are that the exaggerated nature of claims made in advertisements is not so evident to a sizeable proportion of consumers tested. This affirms the potential for puffery being misleading. Rotfeld (1997) examined puffery claims and commented that consumers are just as likely to believe claims that are exaggerations of fact as they are to believe factual claims made in advertisements, and thus concluded that puffery can deceive consumers.

Rotzoll (cited in Haan 2013) reported that 39.6% of their sample in their study believed claims that were puffery. The subjects chosen for the research were all at above average education levels. Preston (1996), however, postulated that it is generally assumed that those of higher education levels are less likely to believe a puffery. In another study (Shimp 1978), it was found that over 50% of the participants indicated that they believed that the puffery did imply that facts that were not made in the claim were true.

The next conclusion drawn from previous research is that facts may be inferred from puffery and these do contribute to the knowledge a consumer has about a product (Holbrook 1978). Although the overall effect of puffery is exaggeration, it nonetheless shows how good

a product is, and consumers retain this point. Consumers process the puffery claims as fact and draw inferences on the basis of those facts.

There has also been research conducted on how verbal puffery influenced pre-purchases (Oliver, cited in Toncar & Fetscherin 2011). This research looked at how exaggerated statements made verbally could cause a consumer to be influenced for a future purchase. The decision to purchase a particular item may have already been made well before it is purchased.

Vanden Bergh and Reid (1980b) investigated the fact that exaggerated claims can produce negative effects. Here the research looked at whether the puffery can have the effect of dissuading a consumer from making a purchase due to the lack of trust in a product resulting from an untruth used to market it. It found that a consumer's belief did have the tendency to reduce each time the puffery message was repeated.

Consumers tend to be more tolerant of advertising exaggeration than any other message forms (Shimp & Preston, cited in Toncar & Fetscherin 2011). The nature of puffery and how it is employed tends to make it more acceptable. Even if it is not believed, it still does put the product in a positive light.

Petty et al. (1983) and Garcia-Marques and Mackie (2001) state that studies based on the Proximity effect show that a higher repetition of messages has a stronger persuasive effect. This research runs counter to the research by Vanden Bergh and Reid (1980b). The latter research demonstrates how repetition can help entrench an idea in the mind of a consumer. The fact that a message is repeated may hint at there being some truth in it, since it has not been removed from circulation.

Walker et al. (1986) and Manning et al. (2001) found that puffery can make a product more familiar and draw relevance to a consumer. It motivates them to make comparisons with other products in the same category. One of the main objectives of marketers is to inform the consumer about the existence and availability of a product. Puffery usage makes a product stand out from the rest, and even if the claims are not believed, it can prompt enquiry in the mind of the consumer. This further entrenches the product in the mind of the consumer as they follow up with further investigation about the product.

Kamins and Marks (1987) researched the effects of puffery on product attitude and purchase intentions, and also concluded that consumers believe the claims made in puffery. The belief that a consumer can have in the product may not match the intensity of the

exaggerated claim, but it certainly makes them believe that the product is worthy of consideration.

Richards (1990) and Preston (1996) investigated the role of puffery as it relates to deception, and considered whether puffery constituted deceptive advertising. They postulated that, if puffery is believed even to a small extent, then it makes it a deceptive practice. The conclusion we can draw from this is that expectations of the marketer and the consumer as to what can be believed needs to be at the same level to ensure no deception can arise.

Haan and Berkey (2002) argued that salespeople and advertisers use puffery because it works. This research proves that the effectiveness of puffery in securing increased sales overrides any other justification it may have for its use.

Cowley (2006) showed that, whilst consumers were able to identify an exaggerated claim, the evaluation of the brand was still more positive when puffed claims were used. Puffery claims are more effective than factual claims. Regulators assume that consumers recognize the fact that puffery lacks credibility, although there is very little empirical evidence to support this assumption. Cowley (2006) states that regulators work on the assumption that puffery messages are not taken in by consumers, but postulates that the situation may be closer to the fact that puffery messages are taken in by consumers and then later the mind filters them. Thus, the information is retained and can have an effect on the consumer.

Hoffman (2006) postulates that puffery by advertisers is only useful to the seller if it successfully deceives a credulous buyer. This research looked at the intent behind usage of puffery, and also sought to explain the end result advertisers may be targeting. It drew the conclusion that budgets spent on puffery marketing stand justified if it does more than just inform the consumer about a product.

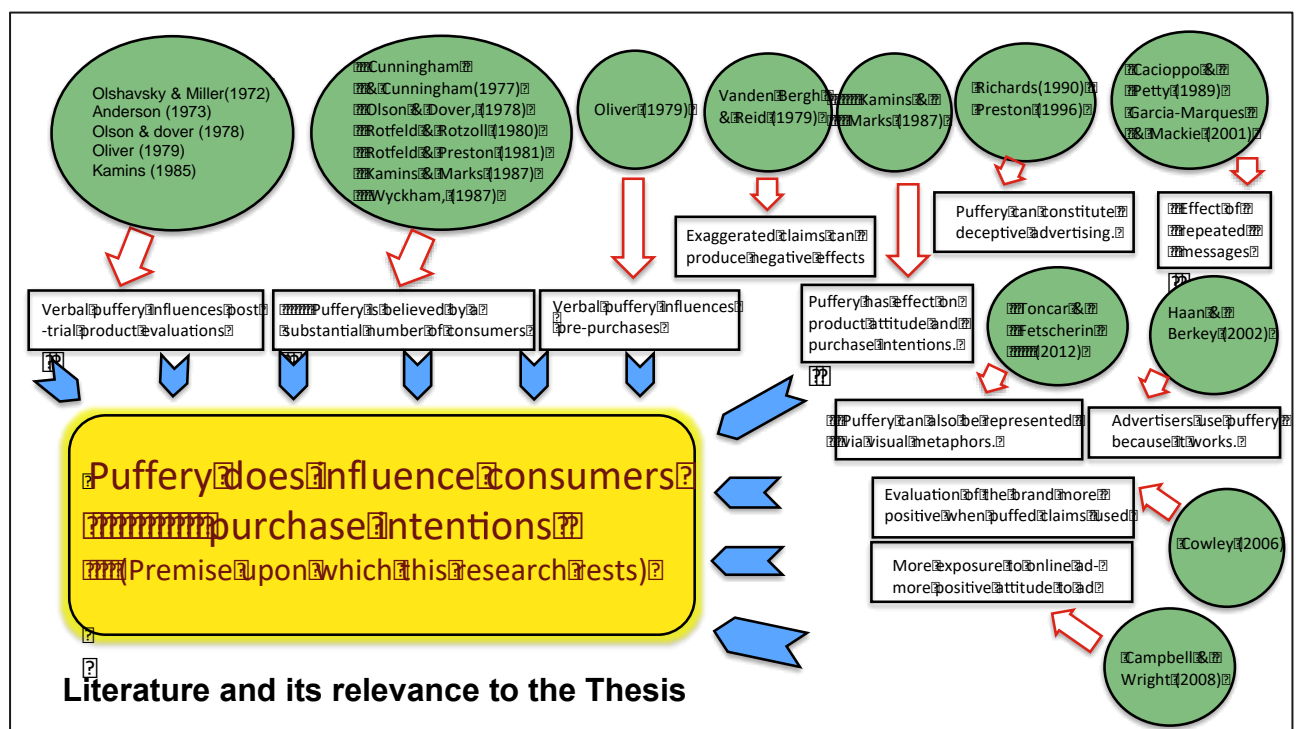
Campbell and Wright (2008) discovered that the more consumers are exposed to online advertising, the more likely they are to form a positive attitude toward those advertisements. Personal relevance and interactivity of online content is an important factor in shaping attitudes of users. Regulators assume that consumers recognize the fact that puffery lacks credibility. Following the stand taken by earlier researchers such as Petty et .al (1983) and Garcia-Marques & Mackie (2001), Campbell & Wright (2008) found that puffery messages put the product in a better light each time the advertisement is repeated. Most of the puffery used in advertisements is pitched at a particular level of knowledge and understanding a consumer is expected to possess. The credulous test imposed by law seems to imply that a consumer is not

expected to know too much. Thus, in many cases, what may be expected to be discounted as untruth by a consumer may not necessarily be the case. The puffery used may have actually been believed whilst regulators assumed it would not be (Cowley 2006).

Toncar and Fetscherin (2011) found that puffery can also be represented via visual metaphors. This research takes a step further to examine puffery beyond just the words stated and images presented. The significance of imagery used also sends a message to consumers and helps strengthen the influence a message can have on the mind. Attributes of products and capabilities get enhanced via usage of visual metaphors.

Jimenez et al. (2013) conclude that puffery claims are more effective than factual claims. The researchers stated that a person's exposure to the particular promotional practice would make them more aware of its effect and truth. The same persuasion tactic may be interpreted differently by one who is not familiar with it. Thus, the response to it will also differ (Friestad & Wright 1994). The nature of puffery claims makes them stand out more in the mind of the consumer than a claim that highlights the truth. This is the reason advertisers constantly try to make their advertisements more creative and use puffery to accentuate their claims. What is believed is also dependent upon whether one has any knowledge about the product. A consumer who views an advertisement about a product he has no knowledge of will find it difficult to differentiate between what is truth and exaggeration (Friestad & Wright 1994).

Any advertisement has the purpose of making consumers aware of the product. The puffery may not be believed but awareness of the product is nonetheless established in the minds of consumers. Furthermore, exaggerating just one attribute of a product, which can have the effect of making the other attributes of the product appear credible. Whilst highlighting the strength of one attribute, puffery can also have the effect of highlighting the weakness of a competitor's product. This idea was examined by Kamins and Marks (cited in Chakraborty & Harbaugh 2012), and they came to the conclusion that puffery can be successful at deceiving customers. Figure 2.1 summarizes the previous research done in this area.



**Figure 2.1 Literature and its relevance to the thesis**

It must be noted that any research that fell within the period of 1972-1991 has to be viewed in light of the fact that the Internet was only being developed in its early stages during this period. The World Wide Web was only launched in 1991 (Zimmermann & Emspak 2017). Google was launched in 1998. Facebook emerged in 2004, and YouTube in 2005. Thus, the earlier research does not reflect attitudes towards puffery in online advertising. Accessibility to information was increasing incrementally from 1991, and the effect of social media on perceptions can only be considered post 2004. The effect of online searches for more information and reviews on the shaping of consumers' perceptions can only be seen in the periods in which this could be achieved.

The conclusions that can be drawn from all these researches is that research has proven that puffery does have a positive influence on purchase decisions. It also has been proven that a sizeable population of consumers believe puffery to be true, thus making it misleading. The motivation of advertisers in using puffery is because it manages to influence consumers. The other interesting point to note is that, while research has proven that puffery is believed by consumers, regulators do not think so. Thus, they do not attach legal liabilities to puffery usage.



Schrank (1975) stated that puffery is viewed as non-deceptive by regulators because of the following rationale. Firstly, they assume that consumers do not rely on positive exaggerated statements when making purchase decisions. This is a view shared by Cowley (2006). Secondly, Schrank (1975) stated that exaggerated statements have no capacity to deceive because consumers do not rely on those statements. All the previous research discussed above, however, states otherwise. The third point is that there is no accepted way to determine whether the puffery used is false (Stern & Eovaldi, cited in Schrank 1975).

Schrank (1975) also made other observations related to puffery usage. Marketers who advertise their products often do not present the other side of the picture with regard to the products they promote. For example, the features of their products are exaggerated but not the higher price needed to pay for these features. Another observation was that many advertisers think that they should keep their word with regard to the claims they make only if they make a profit from it. Therefore, the premise on which advertising is based upon does not necessarily begin with the truth but is conditional on favourable results being obtained as a consequence. Lastly, Schrank (1975) stated that advertising associated with products may cross ethical boundaries when the products themselves do so, and a good example of this is slack packaging. Many products come in containers that are partially filled. The advertisement is staying true to the product, but both the actions of the producer of goods and the marketer are seen to be misleading in the eyes of the consumer. The observation here highlights the fact that there is a discord between marketers' and consumers' perceptions as to the truth. Puffery can cause the lines to be blurred.

Having looked at puffery and the effect it can have, we now examine the second component, Legal Framework. This will provide us with details of where the law stands with regard to puffery and misleading conduct.

## **2.2 Legal Framework**

When we examine puffery and its connection to the law, we find that it is mentioned as an exception to misleading conduct (ACCC, False or misleading statements). It sits within the realm of consumer protection, and is used as a defence in an action for misleading or deceptive conduct under s.18 ACL or for false representations under s.29 ACL. The case laws that are examined in this chapter will highlight its usage as a defence. Before embarking on a detailed examination of the regulation in this area, a summary of the Acts that have been in place with

regard to consumer protection is provided. Table 2.1 illustrates the chronology of the legislation.

**Table 2.1 Chronology of Acts relating to trade practices and consumer protection in Australia**

|    | Year | Act  |
|----|------|--|
| 1  | 1965 | Trade Practices Act   Trade Practices Tribunal |
| 2  | 1967 | Trade Practices Act commences                  |
| 3  | 1971 | Concrete Pipes Case and repeal of the 1965 Act |
| 4  | 1971 | Restrictive Trade Practices Act                |
| 5  | 1973 | Proposals for new Act                          |
| 6  | 1974 | Trade Practices Act                            |
| 7  | 1985 | Trade Practices Amendment Bill                 |
| 8  | 1992 | Trade Practices Legislation Amendment Act      |
| 9  | 1999 | Electronic Transactions Act                    |
| 10 | 2001 | Trade Practices Amendment Act (No 1) 2001      |
| 11 | 2011 | Competition and Consumer Act 2010              |
| 12 | 2011 | Electronic Transactions Amendment Act 2011     |

**The Trade Practices Act 1974** can be seen to be the logical starting point for the examination of laws relating to misleading practices, because it provides the law as it stood before online transactions became a reality. The **Electronic Transactions Act 1999** marks the first point of regulation of contracts done via the electronic medium. The **Competition and Consumer Act 2010** is the most current restatement of the law in the area.

A brief summary of the **Trade Practices Act 1974**, **Electronic Transactions Act 1999** and the **Competition and Consumer Act 2010** is provided below. A closer examination of their provisions follows the summary.

### ***2.2.1 Trade Practices Act 1974***

This Act dealt with unfair market prices, product safety, misleading practices, price monitoring, and industry codes of practice. The Act's objective was to boost consumer confidence and weed out unethical practices by competitors.

In addition to the TPA, each state and territory had fair trading laws that had to be adhered to. The two sets of laws complemented each other.

The laws that are relevant to our area of examination and found in this Act stated that it was unlawful to:

- make false claims about a product or service
- operate in a misleading or deceptive way that might mislead or deceive your customers
- take unfair advantage of vulnerable customers – unconscionable conduct

The penalties for non-compliance were prosecution, financial penalties, and having your bank accounts frozen (Trade Practices Act and Fair Trading Laws, 2007).

### ***2.2.2 Electronic Transactions Act 1999 and Electronic Transactions Amendment Act 2011***

These Acts have provided regulation for contracts entered via online means and thus include online purchases made by consumers. The object of the Act is to provide a regulatory framework that:

- (a) recognizes the importance of the information economy to the future economic and social prosperity of Australia; and
- (b) facilitates the use of electronic transactions; and
- (c) promotes business and community confidence in the use of electronic transactions; and
- (d) enables business and the community to use electronic communications in their dealings with government. (Federal Register of Legislation).

### ***2.2.3 Competition and Consumer Act 2010***

The current law in place with regard to misleading practices is found in the Australian Consumer Law (ACL). The following abstract is from ‘Avoiding unfair business practices - A guide for business and legal practitioners’ (Source: Licensed from the Commonwealth of Australia under a Creative Commons Attribution 3.0 Australia License):

*The ACL aims to protect consumers and ensure fair trading in Australia. The ACL came into force on 1 January 2011 and replaced the Trade Practices Act 1974 and previous Commonwealth, state and territory consumer protection legislation. It is contained in Schedule 2 to the Competition and Consumer Act 2010 (Cth) (CCA) and is applied as a law of each state and territory by state or territory legislation.*

*Under the ACL, consumers have the same protections, and businesses have the same obligations and responsibilities, across Australia. Australian courts and tribunals (including those of the states and territories) can enforce the ACL.*

*The regulators of the ACL are:*

- *the Australian Competition and Consumer Commission (ACCC), in respect of conduct engaged in by corporations, and conduct involving the use of postal, telephonic and internet services; and*
- *state and territory consumer protection agencies, in respect of conduct engaged in by persons carrying on a business in, or connected with, the respective state or territory.*

With regard to the law regulating the area of misleading practices and puffery in Australia, we have the Competition and Consumer Act 2010 (Cth) (CCA) which replaces the Trade Practices Act 1974. Sections 18 and 29 of the Australian Consumer Law (ACL), found in Schedule 2 to the CCA, replace Sections 52 and 53 of the Trade Practices Act with regard to misleading advertisements.

#### *2.2.3.1 Policy Objectives of ACL*

An examination of the policy objectives for this legislation will give us an idea as to what had provided the impetus for a change in the laws in this area. In its review of Australia's consumer policy framework, the Productivity Commission concluded that, while Australia's consumer policy framework had considerable strengths, parts of it required an overhaul. Technological advancements that propelled changes in markets also meant that detriment for consumers from unresponsive policy-making would also escalate. There had to be laws put in place to remain in tandem with the changes. The development of e-commerce and the resulting increase in cross-border transactions raised concerns that needed to be addressed (An Australian Consumer Law-Fair markets-Confident Consumers, 2009, p 5):

“The new national consumer law will deliver on Council of Australian Government's commitment to a seamless national economy by providing a uniform and higher level of protection for Australian consumers and addressing weaknesses in existing laws.” (An Australian Consumer Law-Fair markets-Confident Consumers, 2009, p 6).

Next, an examination of the Sections that regulate misleading and deceptive conduct is provided. The two main provisions in the area of misleading practice that would impact upon puffery are as follows:

**Section 18 of the Australian Consumer Law** states:

*1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*

The following information is summarised from the lecture notes on misleading or deceptive conduct (University of Sydney, 2014)

The first point that needs to be clarified is the term ‘person’ used in this section. As per Australian Constitutional law, the Commonwealth government’s legislation in relation to misleading or deceptive conduct is confined to persons who are corporations (**s. 131(1) CCA**). In relation to misleading or deceptive conduct by persons who are not corporations, the provisions of the ACL are enforced as a law of the State or Territory where such conduct occurred.

**Section 2 of the ACL** states that trade and commerce means:

*(a) trade and commerce within Australia or*

*(b) trade and commerce between Australia and places outside Australia; and includes any business or professional activity (whether or not carried on for profit).*

The ACL has not, however, provided a definition for ‘trade’ and ‘commerce’, and it thus recourse has to be made to previous case laws that have determined the meaning of these two words in the past. The courts have interpreted the words broadly in decisions pertaining to the same words used in the Trade Practices Act 1974.

Deane J, in *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 36 FLR 134 at 167; (1978) 22 ALR 621 at 648-9, said:

*“They are not restricted to dealings or communications which can properly be described as being at arm’s length in the sense that they are within open markets or between strangers or have a dominant objective of profit-making.”*

Nimmo J, in *Larmer v Power Machinery Pty Ltd* (1977) 29 FLR 490 at 493; 14 ALR 243 at 245-6, said:

*“In my view, the expression is intended to cover the whole field in which the nation’s trade or commerce is carried on. I reject the view that it is confined to any particular event which may occur in the conduct of a business which operates within that field.”*

The misleading or deceptive conduct must occur ‘in’ trade or commerce and not merely be incidental to trade or commerce. In *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 at 602-3; 92 ALR 193 at 196-7, Mason CJ, Deane Dawson and Gaudron JJ (at CLR 603-4; ALR 197) said:

*“What the section is concerned with is the conduct of a [person] towards persons, be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character. Such conduct includes, of course, promotional activities in relation to, or for the purposes of, the supply of goods or services to actual or potential consumers, be they identified persons or merely an unidentifiable section of the public.”*

In this case, a foreman had incorrectly explained to a worker how to remove a grate. This led to the worker sustaining injury. The court held that his actions were not done in trade or commerce to qualify his actions as being misleading under Section 18. In *Pilmer v Roberts* (1997) 80 FCR 303, the lectures delivered that were deemed to contain misleading information were once again held not to be coming under the definition within trade or commerce under s.52 of the previous Act, Trade Practices Act 1974.

**Section 2(2) ACL** deals with the meaning of ‘engaging in conduct’. **Section 2(2)(a)** states that ‘a reference to engaging in conduct shall be read as a reference to do or refusing to do any act’. In most cases the ‘act’ will consist of some oral or written statement or representation (*Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546 at 555; 79 ALR 83 at 93). However, it is also clear that the words ‘refusing to do any act’ signify that silence can also qualify as ‘engaging in conduct’.

‘Misleading or deceptive’ conduct is not defined in the ACL. The interpretation of it has been left to the courts, and thus courts at all levels have been called to deal with this. (French CJ & Kiefel J in *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* (2010) at CLR 364; ALR 206). The case summaries provided in 2.2.5 will illustrate this point further.

Conduct is likely to mislead or deceive if there is a real, and not remote, chance or possibility of misleading or deceiving, regardless of whether it is more or less than 50% (*Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82 at 87; 55 ALR 25 at 30).

In *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* at FCR 554-555; ALR 92-3, Lockhart J (speaking for a unanimous Full Court on this point) said:

*“The Compact Edition of the Oxford English Dictionary 1987 defines the word ‘mislead’...as ‘to lead astray in action or conduct; to lead into error; to cause to err’. ‘Deceive’ is defined as ‘to ensnare; to take unawares by craft or guile; to overcome, overreach, get the better of by trickery; to beguile or betray into mischief or sins; to mislead’ ... ‘Mislead’ does not necessarily involve an element of intent and it is a word of wider reach than ‘deceive’.”*

At this point, it is important to consider the relevance of intention to the misleading or deceptive act. Myers (2016) states that usage of puffery does not indicate that there was an intention to deceive. She goes on to add that advertising that deliberately misleads is illegal while puffery is not. The element of needing intention to prove that there was a breach of law is not required in Section 18 as well as in puffery. This is important because the marketer who uses puffery may have intended to deceive, but since that is not called into question, it takes that important dimension out of consideration. This makes it easier for a user of puffery to escape prosecution despite having the intention to deceive.

In order to determine whether the conduct was misleading or deceptive, the test that has been formulated by the courts involves answering the following two questions:

1. At whom was the conduct directed? (Was it a particular section of society?)
2. Would that person (including the gullible, the intelligent and the not so intelligent, the well-educated and poorly educated within that class) have been likely to be led into error by the conduct? (*Taco Company of Australia Inc v Taco Ball Pty Ltd* 1982 42 ALR 177).

If the answer to the second question is ‘yes’, then conduct is considered to be misleading or deceptive. It is interesting to note the following points:

- Mere puffery will not normally contravene s.18 if no reasonable person would believe those representations;
- Silence in circumstances requiring clarification may be misleading or deceptive;
- Evidence that some person has in fact been misled is relevant but not conclusive. (Davenport & Parker 2012).

In *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198; 42 ALR 1 at 6, Gibbs CJ said:

*“Section [18] does not expressly state what persons or class of persons should be considered as the possible victims for the purpose of deciding whether conduct is misleading or deceptive or likely to mislead or deceive.... the section must in my opinion be regarded as contemplating the effect of the conduct on reasonable members of the class. The heavy burdens which the section creates, cannot have been intended to be imposed for the benefit of persons who fail to take reasonable care of their own interests. What is reasonable will of course depend on all the circumstances”*

Puffery is not considered misleading under Section 18 because consumers who are the targets of such promotions are not expected to be misled by the claims made. The puffery does not have the capacity to lead such persons into error. A detailed discussion of this point has been made in Section 1.3.3 of Chapter 1 which tells us why this is not necessarily an accurate estimation.

The other section that deals with misleading conduct is **Section 29**. The following is a summary of some of the subsections that this section contains.

**Section 29 of the ACL** states:

*(1) A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:*

*(a) make a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use*

*(b) make a false or misleading representation that services are of a particular standard, quality, value or grade ...*

*(e) – (g) representations that goods have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have. (Australian Consumer Law, Guide to Provisions (2010)).*

This section is more specific to representations made about products or services. There is no need to show that the defendant knew or intended that the conduct was false. This section has a connection to puffery because, in both situations, claims or representations are made. If



the representations in a puffery-based claim cross the line of being mere exaggeration, then it could also fall into the ambit of this section.

Unlike **Section 18** breaches which may only result in civil penalties and remedies, **Section 29** breaches attract criminal sanctions as well. The maximum financial penalties are severe: \$1,100,000 for a corporation, and \$220,000 for others (**s.224**).

Another section that deals with misleading conduct is **Section 33 ACL**. **Section 33 of the ACL** provides that a person must not engage in conduct that is liable to mislead the public about “goods” “nature”, “characteristics” or “suitability for their purpose”.

In order to contravene the Section, there must be:

1. An objective representation that can be subject to proof.
2. Assuming the statement is objective, the quality of any substantiating data is considered.
3. The adequacy of the substantiating data as a basis for the representation will be examined when coming to a conclusion as to whether a statement is misleading. (Polites 2014).

There is also legislation that deals with advertisements, and this has a connection with puffery. The **Australian Broadcasting Corporation Act 1983** regulates the content of advertisements. Specialist industries have their own codes of ethics that are managed by individual industry groups, including the **Therapeutic Goods Code**, the **Alcoholic Beverages Advertising Code**, and the **Weight Management Industry Code**. The **Advertising Code** and administrative boards regulate all other advertising content (Kerr & Moran 2002). The Australian Association of National Advertisers have adopted a Code of Ethics to ensure that advertisements and other forms of marketing communications are “legal, decent, honest and truthful and that they have been prepared with a sense of obligation to the consumer and society and a sense of fairness and responsibility to competitors.” (AANA).

The following information has been reproduced from the AANA Code of Ethics, and has direct relevance to regulation on misleading practices.

*In this Code, unless the context otherwise requires:*

*Advertising or Marketing Communications means any material which is published or broadcast using any Medium or any activity which is undertaken by, or on behalf of an advertiser or marketer, and over which the advertiser or marketer has a reasonable degree of control, and that draws the attention of the public in a manner calculated to*

*promote or oppose directly or indirectly a product, service, person, organisation or line of conduct.*

*This Code comes into effect on 1 January 2012. It replaces the previous AANA Code of Ethics and applies to all advertising and marketing communications on and from 1 January 2012.*

*1.1 Advertising or Marketing Communications shall comply with Commonwealth law and the law of the relevant State or Territory.*

*1.2 Advertising or Marketing Communications shall not be misleading or deceptive or be likely to mislead or deceive.*

*1.3 Advertising or Marketing Communications shall not contain a misrepresentation, which is likely to cause damage to the business or goodwill of a competitor.*

*3.3 Advertising or Marketing Communications for food or beverage products shall comply with the AANA Food & Beverages Advertising & Marketing Communications Code as well as to the provisions of this Code.*

The ACCC clearly extends the restrictions stated above to online marketing, and that includes usage of social media for promotional purposes. The following are abstracts from their guidelines:

*You must ensure you don't make any false or misleading claims as part of your marketing and promotional activities. This includes advertisements or statements using any media, including print, radio, television, websites and social media channels like Facebook and Twitter.*

*Consumer protection laws have been in place for decades and apply to social media in the same way they apply to any other marketing or sales channel.*

*You can also be held responsible for posts or public comments made by others on your social media pages which are false or likely to mislead or deceive consumers.*

*Examples*

*1) A fan of XYZ Pty Ltd posts negative and untrue comments about a competitor's product on XYZ's Facebook page. XYZ knows that the comments are incorrect, but decides to leave the comments up on its page. XYZ may be held accountable for these comments even though they were made by someone else.*

*2) ABC Pty Ltd and DEF Pty Ltd are market leaders in the paint industry. A customer posts on ABC's Facebook page that their paint always lasts much longer than DEF's paint. ABC is unsure if this is true, but decides not to remove the post. It turns out that ABC's paint does not last longer. ABC may be held responsible for this comment.*

It is imperative at this stage to also examine to what extent the law encompasses the area of puffery and the possible repercussions of its shortfalls.

#### **2.2.4 Limitations of legislation**

1. Puffery is not considered as misleading as per the ACL yet.
2. With regard to electronic transactions, we do have the **Electronic Transactions Act 1999** but there are no specific provisions that deal with puffery, and thus we have to rely on the sections of the ACL. The Electronic Transactions Act 1999 (Cth) has provisions that deal with when and how a contract is made. Of particular interest to this research is **Section 15B**, which states:

*1) A proposal to form a contract made through one or more electronic communications that:*

*(a) is not addressed to one or more specific parties; and*

*(b) is generally accessible to parties making use of information systems; is to be considered as an Invitation to treat, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance. An Invitation to treat occurs when an invitation is made by one party to the other party to make an offer.*

*2) Subsection (1) extends to proposals that make use of interactive applications for the placement of orders through information systems.*

This section implies that puffery used in online advertisements will constitute part of the invitation to treat and therefore sits in a pre-contractual stage. This further enhances its status of legality, and may induce marketers to take liberties with their advertisements.

3. The **Trade Practices Act 1974** was silent as to whether its provisions dealt with electronic transactions. Most of consumer protection provisions specifically applied to conduct that involved the use of “postal, telegraphic or telephonic services”, s.6 (3). The ACCC takes the view that it does. (Smith, 2000).

4. Most laws only apply to transactions carried out between Australian citizens and corporations within Australia. This does not help much when contracts are of a global nature, a common feature in online transactions. International Law will have to be examined, and Conflicts of Law may pose further problems.

Where a contract is entered into between an Australian and a foreigner, or is made in one country but to be performed in whole or in part in another, the law applicable is the law to which the parties intend to apply. Where the parties have not chosen what law to apply, the court will consider the following:

- a) Where the contract was made
- b) Where it is to be performed
- c) The place which has the most real and substantial connection with the contract (Davenport & Parker 2012)

To determine where the contract was made, we need to establish where the agreement was concluded. This will mean where acceptance was completed. Advertisements are generally considered to be Invitation to treat (*Partridge v Crittenden* 1968, 2 All ER 421), and this will include most advertisements in the online setting. However, note must be taken of some exceptions. In the case of *Smythe v Thomas* (2007) NSWSC 844, the court held that placing an item for sale on eBay constituted an offer to sell the item (Davenport & Parker (2012)). In all other advertisements online, the consumer makes the offer to purchase which is then accepted by the seller. This may, in many circumstances, mean that a foreign law will govern the transaction, because the advent of global trading may in many cases mean that the seller is from a country other than Australia. Chances of this happening are more prevalent in the online setting.

Thus, there are limitations as to how much legislation covers the area of puffery.

An examination was then carried out on the existing Acts and Codes that regulate puffery and misleading practices to determine whether regulation has sufficiently deterred unethical trading practices. An examination of case law that has applied these sections was done. The following section details the cases in Australia that were examined. The cases were sourced

from [www.austlii.edu.au](http://www.austlii.edu.au), the official website for reported cases. The cases examined consisted of a mix of cases concerning puffery, as well as cases of misleading or deceptive conduct not necessarily involving usage of puffery. The purpose of examining cases that do not involve usage of puffery is to show the important factors that are considered to determine when conduct is misleading or deceptive, and to give an overview of the law that exists when the boundaries of puffery are crossed. The very fact that the line that separates puffery from misleading or deceptive conduct is not a clear one makes an examination of cases on both sides of the line a necessary step in this research. Brief summaries of the findings are found below. The cases have not been put in chronological order, as the cases dealing with the puffery defence are grouped together first, and then cases dealing with misleading conduct follow afterwards.

### **2.2.5 Common law**

#### *2.2.5.1 Specsavers Pty Ltd v Luxottica Retail Australia Pty Ltd [2013] FCA 648*

The Applicant (Specsavers Optical Group) brought proceedings against the Respondent (part of Luxottica group of companies) under the Australian Consumer Law (ACL) for advertising in relation to an optical marketing campaign which began in February 2013. This is the most recent bout in what is an ongoing chain of disputes between the two rival companies. The Court found that the Applicant had not made out any claims under the ACL and dismissed the proceeding.

On 25 February 2013, the Respondent launched its “Accufit marketing campaign” (Accufit Campaign) which comprised television commercials, a web video for the OPSM site, Internet website and digital advertising, visual merchandising, and customer relationship materials. The Accufit Campaign promoted the Accufit system which consisted of three components, the Virtual Mirror, the Lens Simulator, and the Fit Sensor.

The advertising made the following representations:

1. “Better frames, better lenses, better fit, Accufit exclusive to OPSM”; “better frames, better lenses, better fit”; and “better frames, better lenses, and the best fit you've ever had” (The Applicant's claim was for the phrase “better frames, better lenses” only) (the Better Frames, Better Lenses Representation);
2. “Now available exclusively in all OPSM stores”; and “in stores at OPSMs everywhere”, in conjunction with the promotion of a glasses-fitting system (Availability representation); and

3. “Once upon a time, fitting your prescription into your lenses involved a ruler, a felt pen and a steady hand. Thanks to the Accufit fit sensor, that's now obsolete” (Ruler Representation).

The Applicant claimed that the three Representations constituted conduct in breach of sections 18 and 29(1)(a) of the ACL. The Respondent submitted that the phrase “better frames, better lenses, better fit” was mere puffery and should be read together as a single message about the fitting of the glasses. Justice Griffiths found that the representations appearing on the window poster were advertising puffery.

In relation to the Availability Representation, the Court found in favour of the Respondent. The Court agreed that the representation that the Accufit system was “available” in all stores did not mean it had to be invariably deployed for every sale in a mandatory sense, but available on an “as needed” basis.

The Court also found in favour of the Respondent in relation to the Ruler Representation. The Court considered the literary implications of this representation, and held that there was a distinct element of hyperbole that gave the advertisement the quality of puffery. The Court also accepted the fairy tale submission that it referenced past practices (Norgard & Dang 2013).

#### *2.2.5.2 Swisse Vitamins Pty Ltd v The Complaints Resolution Panel (2012] FCA 536*

On Friday 25 May 2012, Tracey J of the Federal Court in Melbourne delivered his judgment in *Swisse Vitamins Pty Ltd v The Complaints Resolution Panel*. The proceedings related to a decision by the Complaints Resolution Panel (the Panel) that advertisements published by Swisse Vitamins (Swisse) were in contravention of the Therapeutic Goods Advertising Code. Two complaints were received by the Panel in late 2011. They related to a number of advertisements relating to Swisse’s products (the Complaints).

The Complaints were focused on:

- 1) Swisse’s slogan, “You’ll feel better on Swisse” (the Slogan); and
- 2) Swisse’s representations that its products had “proven results”.

The Complaints alleged that Swisse had breached the following Code requirements:

- i. An advertisement must only contain correct and balanced statements that the publisher has already verified

- ii. An advertisement must not be likely to arouse unwarranted and unrealistic expectations of product effectiveness
- iii. An advertisement must not be likely to mislead, directly or by implication through emphasis, comparisons, contrasts or omissions
- iv. An advertisement must not contain the claim that it is effective in all cases and
- v. A comparative advertisement must be balanced and must not be misleading or likely to be misleading.

The Panel found that each of the advertisements, which were subject of the complaints, breached one or more of the Code's provisions. The Complaints Resolution Panel considered that the slogan, "You'll feel better on Swisse", was likely to cause a different impression if it were used in an advertisement alongside claims about product benefits that were unsubstantiated or misleading. The Panel found that Swisse had breached the requirement that an advertisement must only contain correct and balanced statements that the publisher has already verified. The Panel found that the slogan would be interpreted as "mere puffery" by a reasonable consumer when used in isolation and not in connection with individual products or specific claims of health benefits.

Before the Federal Court, Swisse submitted that the Panel had made a series of adverse findings against Swisse without first giving Swisse the opportunity to respond to the relevant matters. However, Tracey J of the Federal Court came to the view that the Panel's Decision in its entirety would have to be set aside, as the *Therapeutic Goods Regulations 1990* (Cth) require that the Panel gives written notice of its decision to do so to the person apparently responsible, and this they had failed to do. Whilst the Panel had provided Swisse with copies of the complaints, Tracey J came to the view that the Panel's Decision in its entirety would have to be set aside, including the requests that Swisse withdraw the advertisements. (Nettleton, 2012).

#### *2.2.5.3 Proctor & Gamble Australia Pty Ltd v Energizer Pty Ltd (2011) FCA 1347*

There were three questions before the Court. The first question was whether the use of the Hydro Products did in fact have a moisturising/hydrating effect on the user's skin during the shaving process. Energizer admitted that the Hydro Materials did make the Transient Hydration Representation, but denied that the representation was false, misleading, likely to mislead, deceptive, or likely to deceive. The parties agreed that Energizer would have contravened the ACL by making the Transient Hydration Representation and it did not have that effect. Secondly, the issue in contention was whether Hydro Materials had made the Long-Lasting

Hydration Representation. Energizer admitted that the Hydro Products only had a moisturising/hydrating effect during the shaving process, but denied that Hydro Materials made the Long-Lasting Hydration Representation. The parties agreed that Energizer would have contravened the ACL if the Court found that it had made the Long-Lasting Hydration Representation. The third issue was whether the Best Shave representation made by Energizer was mere puffery or misleading practice.

Some of the legal principles and precedents considered were:

- The conduct in question must contain or convey a misrepresentation in order to be misleading. Whether or not particular conduct is misleading is a question of fact to be determined having regard to the context in which the conduct takes place and the surrounding factual circumstances (*Taco Co of Australia Inc v Taco Bell Pty Ltd* [1982] FCA 136; (1982) 42 ALR 177 at 199).
- The conduct of the respondent must be viewed as a whole, taking into account all words and acts (*Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* [1982] HCA 44; (1982) 149 CLR 191 at 199 per Gibbs CJ).
- Whether the standard of the ordinary or reasonable member of the class of prospective purchasers is to be applied in judging potential misleading or deceptive conduct (*Campomar Sociedad, Limitada v Nike International Ltd* [2000] HCA 12; (2000) 202 CLR 45 at [103] and [105]).
- The particular facts of the case considered in light of the ordinary incidents and character of commercial behaviour will help determine if claims made are mere puffery (*ACCC v Henry Kaye and National Investment Institute Pty Ltd* [2004] FCA 1363 at [122]).

In the Court's findings, the court stated that the "best shave for your skin" claim was used as a slogan to attract the consumer's attention to the Hydro 5. In the court's view, the consumer would not understand the expression as conveying a representation that was capable of actual assessment. Consumers normally regard such claims as puffery and not statements of fact.

The court stated that the "best shave for your skin" claim is an absolute and does not make a comparative claim. There is no explicit reference to another product in the claim. The reasonable consumer would not see such an assertion as making an implicit comparative claim.

The "best shave for your skin" claim, as it appears in the relevant forms of the Packaging, is mere puffery. The Packaging does not make the Best Shave Representation. The "best shave



for your skin” claim, as it appears in the Display, is mere puffery. The Display does not make the Best Shave Representation. The “best shave for your skin” claim, as it appears in the Daily Telegraph Advertisement, is mere puffery. The Daily Telegraph Advertisement does not make the Best Shave Representation.

The “best shave for your skin” claim, in the context of the Schick Online Advertisement, would be taken literally and treated seriously by the reasonable consumer even if it was not in highly precise terms. Although the features displayed on the relevant pages were not described in quantitative terms, they were classified as being “revolutionary new technology”. This, taken in the context of the “best shave for your skin” claim, meant that the Schick Online Advertisement had put forward a factual basis in support of the claim made. Furthermore, the heading, in bold, “revolutionary new technology puts skincare at the heart of shaving”, made reference to other wet shave razors by implying that these razors had not placed the same degree of emphasis on skin care as the Hydro 5. This represented, to the reasonable consumer, in combination with the “best shave for your skin” claim, that the Hydro 5 would lead to the best shave for the user’s skin in comparison with other wet shave razors. The reasonable consumer would derive from the Schick Online Advertisement that the Hydro Products represented new technology, which underlies the “best shave for your skin” claim for the Hydro 5. The “best shave for your skin” claim is not mere puffery in the context of the Schick Online Advertisement as a whole. The Schick Online Advertisement makes the Best Shave Representation.

For the same reasons as those set out in relation to the Daily Telegraph Advertisement above, the “best shave for your skin” claim as used in the Hydro Online Advertisement was held to be mere puffery. The Hydro Online Advertisement did not make the Best Shave Representation.

The final decisions were that Energizer did not contravene ss. 18(1) and 29(1)(g) of the ACL by making the Transient Hydration Representation. With the exception of the Zoo Weekly Advertisements, the Hydro Materials did not make the Long-Lasting Hydration Representation. By making the Long-Lasting Hydration Representation in the Zoo Weekly Advertisements, Energizer contravened ss. 18(1) and 29(1)(g) of the ACL.

With the exception of the Schick Online Advertisement, the Hydro Materials did not make the Best Shave Representation. Whether Energizer contravened ss 18(1) and 29(1)(g) of

the ACL by making the Best Shave Representation in the Schick Online Advertisement was not a matter for consideration for the court in that hearing.

#### *2.2.5.4 Lymquartz Pty Limited v 2 Elizabeth Bay Road Pty Limited [2007] NSWSC 457*

The claim of misleading or deceptive conduct in contravention of s 52 Trade Practices Act 1974 (Cth) was raised in this case. The case involved a purchase of apartments in hotel that were undergoing redevelopment into an apartment building. The issues were as follows:

- whether the selling agent's representation that it would be a "one bedroom" apartment was misleading or deceptive because the bedroom wall was not fixed but a sliding one.
- whether the selling agent had represented that the bedroom wall would be brick, that the apartment would have a kitchen in a separate room, and that all walls would be brick.
- whether the "sense of space" statement in the marketing brochure was mere puffery or actionable as misleading or deceptive conduct.

On 6 November 2003, the plaintiff, Lymquartz Pty Ltd, entered into two separate contracts with the defendant, 2 Elizabeth Bay Road Pty Ltd, to purchase apartments T1204 and C904, in the Gazebo buildings at 2 Elizabeth Bay Road, Elizabeth Bay. The plaintiff's directors, Mrs Laura Goltsman and her husband Mr Joseph Goltsman, guaranteed its obligations. The purchase price was paid under each contract. At the time of contract, these apartments were part of a redevelopment being undertaken by the defendant that involved conversion of the existing buildings into residential units. The alleged misleading and deceptive conduct relates only to apartment T1204. The misleading conduct was alleged to be in the five pre-contract representations made by Mr Christian Cirillo, a real estate agent employed by the defendant's selling agent, Colliers International Pty Ltd.

The third representation made involved the puffery issue and was found in a colour brochure, which Mr Cirillo gave to the Goltsmans on their first inspection. The brochure stated the units would have "interiors with a sense of space" and be "comfortable and easy and very liveable".

The plaintiff pleaded that, contrary to the sense of space representations, the apartment had excessively low ceiling heights. The defendant's argument was that the statements in the brochure were puffery.

Puffery is often used in the sale of real estate property. Whether pre-contractual representations are actionable or merely puffery depends on the particular facts, considered “in the light of the ordinary incidents and character of commercial behaviour” (Australian Competition and Consumer Commission v Kaye [2004] FCA 1363 at [122] per Kenny J).

In *Overlook Management BV v Foxtel Management Pty Ltd* [2002] NSWSC 17 at [118] – [120], Barrett J set out the general principles that would be considered when making a decision as to whether a statement was misleading as per s 52 of the TPA:

- (a) Puffery is given latitude in commercial dealings.
- (b) “statements alleged to be caught by s 52 must always be assessed in their context”.
- (c) a certain amount of hyperbole is permissible and to be expected in business without attracting legal sanctions.

In *Hanave Pty Ltd v LFOT Pty Ltd* (1998) ATPR 41 – 658 at 41,320, Moore, J observed that the whole of the conduct must be looked and not just the particular matter on which the plaintiff has focused attention (referring to *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* [1982] HCA 44; (1982) 149 CLR 191, 199 and *Pappas v Soulac Pty Ltd* [1983] FCA 3; (1983) 50 ALR 231). In the *Pappas* case, Fisher, J said that an agent’s statements about the “commercial” viability of a shopping centre were essentially introductory comments and thus mere puffery. A potential “purchaser with commercial experience would not find them to be anything but that.

In *Mitchell v Valherie* [2005] SASC 350; (2005) 93 SASR 76 (CA) at [71] – [73], White J said:

- (a) *“Statements that are so vague as to be incapable of being given any reasonably precise meaning or because they are exaggerated commendatory opinion rather than a statement of any factual matter do not give rise to an actionable misrepresentation.”*
- (b) *“The more specific the words used, the less likely it is that they will be regarded as mere puffery.”*
- (c) *“In each case the statements have to be considered in their own context so as to determine what both the speaker and hearer would have understood them to mean.”*

The brochure gave preliminary information, that puffery is to be expected in brochures of this type, and that it is difficult to elevate the words in this brochure to the status of

misleading or deceptive conduct or to say that they gave information upon which a person should rely on. It is difficult to convert statements such as “a sense of space” in a brochure into meaningful representations of fact. What is viewed as having a “sense of space” or being “easy and comfortable” by one person may not be so regarded by another.

Given this context, the courts had difficulty in seeing how the statements in the brochure were misleading or deceptive in relation to ceiling heights or how the Goltsmans could have relied on the statements.

#### *2.2.5.5 Mitchell & Anor v Valherie [2005] SASC 350*

This case concerned an appeal against a judgment of the District Court that awarded damages of \$53,409.70 to the purchaser of a house. The vendor’s agent had made representations about the house in the newspaper, and the advertisement described the house as “Cosy-Immaculate”. The brochure produced by the vendor’s agent at open inspection stated that there was “Nothing to Spend - Perfect Presentation”; but inspections subsequent to the purchase revealed inadequate foundations on reactive soil and that there was structural damage requiring extensive repair. The question was whether the agent’s statements contained representations of fact or whether it was promotional puffery or opinion. The question for the court was whether the content of the representations constituted a material misrepresentation, and whether there was admissible evidence of the existence of the alleged defects at the time that the statements were made. Other questions were whether the doctrine of caveat emptor applied in this case, and to what extent the respondents had relied upon representations. There was also a question whether there was an error in the assessment of damages. The Cross-appeal by the respondent centred on whether the trial judge had erred in assessment of damages, in particular with respect to consequential losses. There was also the question of whether the conduct of appellants was unconscionable.

The first question is whether the statements were representations of fact, or whether they were merely puffery. When considering whether statements are misleading, it is necessary to consider them in the context of all the circumstances surrounding their making, including the respective experience and knowledge of both the maker of the statements and those said to have relied upon them. Statements of a general promotional nature addressed to sophisticated investors made in the context of extensive negotiations may be regarded by the courts as amounting to no more than promotional material or puffery. Whether statements are to be characterised as puffery will depend upon the circumstances surrounding the making of the

statements, and how the representations were understood by the person to whom they were made.

Many of the statements alleged or admittedly made by Mr Spencer were wholly or in part statements of opinion, not capable of being objectively proved to be true or false. They were also essentially the type of introductory comments, in the nature of puffery made at the start of negotiations for the purpose of attracting the interest of a possible purchaser. As such, they became irrelevant when detailed information was subsequently given a fortiori, to a potential purchaser with commercial experience. To that extent, they are essentially puffery and not potentially misleading conduct.

However, the statement, “Nothing to Spend – Perfect Presentation”, contained in the brochure, connotes more than a mere opinion about the property. It goes beyond puffery. The subject words formed an essential part of the description of the house, representing to a prospective purchaser that it was habitable and that no major expenditure would be required in the immediate future. The words, “Nothing to Spend”, conveyed to a prospective purchaser that no additional expenditure would be required in the near future. The context in which the words “Nothing to Spend” appeared went beyond a mere enticement or puffery, and amounted to a factual representation.

The essence of misrepresentation is that it led the representee into error. This must be tested objectively: would a reasonable person in the position of the representee be led into error by the statement?

Statements that are so vague as to be incapable of being given any reasonably precise meaning, or that are exaggerated commendatory opinion rather than a statement of any factual matter, do not give rise to an actionable misrepresentation. There are some introductory comments made at the start of negotiations for the purpose of attracting the interest of possible purchasers, which are not reasonably to be understood as conveying a representation of fact. The more specific the words used, the less likely it is that they will be regarded as mere puffery.

The second consideration is that the words, “Nothing to Spend – Perfect Presentation”, have to be read as a whole. The words “Perfect Presentation” are clearly enough words of promotional puffery. A reasonable prospective purchaser of real estate would not understand those words as conveying a representation of fact. The words “Nothing to Spend”, which immediately proceed them, take their colour, to some extent, from those words.

A literal meaning of “Nothing to Spend”, by itself without any context, conveys a representation that there was ‘not a thing to spend’. In the absence of context, there is no limitation as to the subject matter of spending or any limitation as to time, whether it be at that moment, or next month, at some indeterminate time in the future or, indeed, ever. However, the court stated that the phrase does not stand alone. The phrase is linked to “Perfect Presentation”, being a phrase of puffery, and reinforces the perfection of the presentation of the property. That is, the presentation of the property is so perfect that there is “Nothing to Spend”. In this sense, it could again be regarded as part of the puffery, and it took no account of the taste of a potential buyer. However, the court considered that the preferable interpretation is that the phrase “Nothing to Spend”, in its context, amounts to a representation of fact.

The clear focus of the descriptive words used in both the advertisement and the brochure was on the visual appearance of the house property. The words “Nothing to Spend” were precisely linked with the words “Perfect Presentation”. The words did not, in the context, expressly or impliedly convey anything more about the property other than a glowing description of its presentation. It does not expressly or impliedly say anything about whether the house was structurally sound, or indeed whether the plumbing or electrical wiring was sound. The words in issue are specifically connected to the presentation or appearance of the house, and indicate there was nothing to spend on presentation. In this sense, although the words were connected to words of puffery, they purport to represent a statement of fact, namely that there was nothing to spend, but this was limited to presentation only. It was not representing that there was “Nothing to Spend” on other aspects of the property such as structural matters or plumbing or electrical wiring.

By a majority decision, the appeal was allowed, and the cross-appeal was dismissed.

#### *2.2.5.6 Taco Company of Australia Inc. v Taco Bell Pty Ltd (1982) 42 ALR 177*

The facts of this case are not as important as the principle it has enunciated. The courts stated that, for a violation of s 52 of the Trade Practices Act 1974 to occur, the conduct engaged in must be misleading or deceptive. Whether this is so depends upon the context in which the conduct took place. Resolution of this issue is a question of fact to be answered in the context of the evidence as to the alleged conduct and as to relevant surrounding facts and circumstances. This case thus provides us with the basis on which misleading or deceptive conduct will be judged. It also tells us that the law relating to this area will be applied on a case by case basis.

#### *2.2.5.7 Parkdale Custom Built Furniture Pty Ltd v Puxu Ltd (1982) 149 CLR 191*

Both manufacturers in this case produced and sold certain furniture that looked almost identical. However, upon close inspection, differences were seen. Both manufacturers had labelled their products. Parkdale attached their label on the bottom of the furniture. The case established the general principle that, if an article is properly labelled so as to show the name of the manufacturer or the source of the article, its close resemblance to another article will not mislead an ordinary reasonable member of the public. The true operation of the principle is that all of the contextual circumstances must be considered. The courts demonstrated that something that may confuse is not necessarily misleading or deceptive. This case has been examined and was deemed to be relevant to this research, because puffery is not always clear and thus may cause confusion or in other circumstances move beyond just causing confusion, and may actually be misleading or deceptive.

#### *2.2.5.8 General Newspaper Pty Ltd vs. Telstra Corporation (1993) ATPR41-274)*

This case restated the common law principle that an advertisement is not normally seen as an offer but as mere puffery and thus cannot lead to a misrepresentation. However, the courts said the misleading and deceptive provisions of Acts do not make such a distinction. Based on this, it does not mean that the courts will regard all puffery as misleading and deceptive conduct. As always, it depends on all of the facts and circumstances and whether the boundaries of what constitutes puffery have been crossed.

#### *2.2.5.9 Campomar Sociedad, Limitada v Nike International Ltd (2000) 202 CLR 45*

When considering whether there is a match between a consumer's understanding of the knowledge they are supposed to have (to know if puffery is being used in an ad) and the marketer's expectation of the knowledge a consumer should have, it is always important to determine what the law sets as a standard to be applied to both parties, to ensure there is no disparity in the two levels. This case sheds light on this matter.

The appellants and respondents registered identical trademarks in respect of different products. It was alleged that the appellants' use of a trademark was likely to deceive or cause confusion, and that the appellants intended to take advantage of the respondents' goodwill. There was an application by the respondents to expunge the appellants' trademarks. The question of misleading or deceptive conduct was raised, and the significance of "erroneous assumption" was discussed. The nexus between conduct and misconceptions or deceptions,

and the effect upon ordinary or reasonable members of the class of prospective purchasers to whom the conduct was directed, were considered. Their Honours added that, in determining the question whether conduct properly should be categorised as misleading or deceptive or as likely to mislead or deceive, the nature of the erroneous assumption, which must be made before conduct could have that character, will be a relevant and sometimes decisive factor.

#### *2.2.5.10 ACCC v Target Australia Pty Ltd [2001] FCA 13261*

In this case, the impression to be gained by consumers from the advertisements was that no item of clothing or house ware was excluded from the respective sales. That impression was reinforced by the voice-over statement, “25 per cent off every stitch of clothing”, and “15 to 40 per cent of all house wares including tableware, furniture, kitchen appliances, cookware and lighting”. As far as the visual images were concerned, the size of the words containing the qualifying advice, compared with the size of the Target name and rondel, was not sufficient to distract attention from the latter (Bhojani, (2001). The case highlighted the point that qualifications cannot contradict headline claims. The consumer should not be required to exhaustively search for those facts. Business must clearly direct the consumer’s attention to the most significant points of sale, so that the consumer can make a reasonable and informed judgment about whether to buy the product.

#### *2.2.5.11 Gillette Australia Pty Ltd v Energizer Australia Pty Ltd (2002) 193 ALR 629*

The case concerned rival manufacturers of batteries who had used comparative advertising. The advertisement contained a comparison showing the appellant’s battery to be three times more powerful than one of respondent’s batteries. The claims overstepped the boundaries of puffery because claims made could be verifiable and thus did not have the cloak of puffery to cover them from liability. The question for the court was whether the comparison was misleading and deceptive because the cheaper retail cost of the comparator battery was not shown. The other question was whether the comparison was misleading and deceptive because of the omission of any reference to the rival’s equivalent battery. The Full Federal Court’s decision suggested that a widely disseminated advertisement will only be considered likely to mislead or deceive where the overall impression conveyed would lead members of the viewing public into error.



#### *2.2.5.12 ACCC v Cadbury Schweppes Pty Ltd (2004) ATPR 42-001*

In 2004, the ACCC took court action against Cadbury Schweppes Pty Ltd over pictorial representations it made of real fruit on two Cottees cordial products. Pictures of kiwi fruit on the label of a cordial concentrate gave the impression that the product contained this fruit. The court stated that the pictures of kiwi fruit are sufficiently prominent and sufficiently recognizable to create an impression in the minds of some reasonable consumers as to the presence of extracts of kiwi fruit in the product. The Federal Court found that these representations were false, and that Cadbury Schweppes had engaged in misleading or deceptive conduct that contravened the Act (Food descriptors guidelines, November 2006).

The following questions should be considered:

- How will susceptible members of the target audience react?
- What will they think the characteristics of the product are?
- How will they interpret the important points?
- What could they possibly miss or fail to appreciate?
- What aspects of the label need a stronger emphasis?
- What overall impression or likely impression could the message give to its audience?
- Does this impression match the true facts and the real picture?

The Federal Court found that these representations were false, and that Cadbury Schweppes had engaged in misleading or deceptive conduct that contravened the Act.

#### *2.2.5.13 Bembridge v Just Spectacles Pty Ltd [2006] WASC 18*

Just Spectacles had displayed a poster in a shopping mall saying, “Buy one pair – get another pair free” and “double for nothing”. The offer was not unconditional. However, while a qualifier was located at the bottom of the poster, it was “inconspicuous”, unlikely to be noticed by passing shoppers, and it was not linked to the principal offer by means of asterisk or any other device. The puffery ‘defence’ failed in this case. The Supreme Court held that the poster was false or misleading. While there may have been “some element of hyberbole” involved, it was evident that when the words “double for nothing” were read with the words “buy one pair – get another pair free” – they together constituted a clear offer. There was “no element of puffery” in the representation. The qualification implied by the words “conditions apply” was not effective in all the circumstances applying to the display of the poster.

#### *2.2.5.14 eBay International AG v Creative Festival Entertainment Pty Ltd (2006) FCA 1768*

The respondent (Creative) was the promoter of the festival known as the Big Day Out (BDO). Tickets were sold on BDO and Ticketmaster websites. There was a condition printed on the back of the tickets that stated that the tickets could be cancelled and the holder refused entry if the tickets were found to have been resold. In this case, eBay successfully argued that Creative did not have the right to make that representation. This statement created a false impression that Creative had the capability of detecting resales and cancelling them. In this case, the misleading representation did not relate to the subject matter directly but rather the capability of detecting misuse of the product and the subsequent action that would be taken to sanction the misuse (Davenport & Parker (2012)).

#### *2.2.5.15 ACCC V Telstra Corporation (2007) FCA 1904.*

Telstra made various claims about its Next G mobile network, including that it had “coverage everywhere you need it”. In its defense, Telstra argued that some of the advertisements directed consumers to its website, where various disclaimers about the extent of its network’s coverage could be found. The court held that this disclaimer did not prevent the conduct from being misleading or deceptive, as it did not sufficiently communicate the information to potential customers (Davenport & Parker (2012)).

#### *2.2.5.16 Alami v Langov & Ors [2008] NSWSC 812*

The plaintiff alleged misleading conduct in trade or commerce and that it was unlawful under the Therapeutic Goods Act 1989 (Cth) to operate a machine whilst it was unregistered. The second and third defendants in this case were ordered to pay to plaintiff damages of the sum of \$60,462.

#### *2.2.5.17 ACCC v C I & Co Pty Ltd (2010) FCA 1511*

In this case, a Western Australian egg wholesaler, C.I. & Co Pty Ltd, Antonia Pisano and Anna Pisano, supplied cartons of eggs to the public between 2004 and 2010 labelled as “Free Range” and “Fresh Range-Omega 3”. The respondents were found to have engaged in misleading and deceptive conduct by making claims that they were selling ‘free range’ eggs when a substantial percentage of the eggs were from caged hens. A fine of \$50,000 was imposed. Justice North said, “the conduct amounted to a cruel deception on consumers who mostly seek out free range eggs as a matter of principle...” The Court considered that C.I. earned a significant amount of revenue they would not otherwise have earned if the eggs had been truthfully labelled as “cage

eggs” (Voiceless, 2015). The case illustrates the fact that claims made about products must be true of all the products sold and not just a portion of them, especially when no qualifier has been made with regard to this fact.

#### *2.2.5.18 ACCC v Global One Mobile Entertainment Ltd (2011) FCA 393*

Misleading statements were made about ring tones, games and quizzes. One of the statements made customers believe that they were purchasing a “once-off” ring tone featuring a Justin Bieber song, when in fact they were signing up to a subscription service that cost \$13.20 initially and then \$6.60 every 6 days. Global One and 6G were found to have contravened Sections 52 and 53 TPA (1974) and were fined \$225,000. A double opt-in procedure and instant refunds offered to those under 18 years of age who had subscribed did not alter the fact that the advertisements were misleading (Davenport & Parker 2012). This case illustrates the fact that the offer of amends does not wipe out the fact misleading conduct has been utilized.

#### *2.2.5.19 ACCC v Singtel Optus Pty Ltd (No 4) (2011) FCA 761*

Singtel Optus conducted a multimedia advertising campaign promoting two broadband data service plans to consumers – the ‘Think Bigger’ and ‘Supersonic’ plans. The campaign involved advertisements in numerous different media: television, metropolitan and local newspapers, billboards, online and direct marketing. The ACCC commenced proceedings against Optus on various bases, including that the advertisements were misleading as to the quantity of data that a customer was entitled to upload or download under the plans (Australian Government Solicitor 2012). In the present case, Singtel was again found to have practised misleading conduct as per ACL provisions, and a \$5.26 million fine was issued under Section 76E.

The following cases highlight recent developments in online purchasing and the litigation taken in respect of misleading practices. The first case highlights the effects of comments made on social media that turned out to be misleading practice. Although puffery was not the issue at hand, the important elements of persuasion and influence were discussed and adjudicated upon. Reviews and comments have the ability of strengthening belief and instilling confidence in the mind of a consumer. This can be equally true whether the advertisement in question contained puffery or not. It is for this reason that this case is looked at. The other reason is to highlight the fact of the law reaching out to regulate the latest trends and aids used in online shopping. This is the reason the other cases that follow are discussed.

#### *2.2.5.20 Seafolly Pty Ltd v Madden [2012] FCA 1346*

In this case, comments made on Facebook were found to be misleading. Leah Madden, the designer of White Sands Swimwear, made a number of comments about her competitor, Seafolly, on her personal Facebook page and by email. She posted photos of Seafolly swimwear and labeled them with White Sands design names. Leah also made comments which had the effect of stating that White Sands designs had been “ripped off” by Seafolly. She also emailed a number of media outlets and shared photos of her earlier designs that looked very similar to the new Seafolly designs. Her statements were found to be misleading. The fact that the comments were posted on her personal Facebook page did not allow her to escape liability. She was ordered to pay Seafolly \$25,000 in damages (McLaughlin Lawyers, 2016).

#### *2.2.5.21 Cases involving Apps*

The next three cases concern misleading practices brought in America with regards to sales of Applications, more commonly known as Apps. Since Apps can be downloaded anywhere in the world, these cases are equally applicable to consumers in Australia.

In 2014, Google agreed to pay at least \$19 million to affected Android users and change its billing practices. This was in answer to a Federal Trade Commission complaint that the company had unfairly billed Android mobile device owners for in-app purchases made by their children (Gross, G 2014).

Similar complaints were raised against Apple and Amazon.com. Apple agreed to pay at least \$32.5 million in settlement for similar billing offences, and had to change its labelling of apps from “free” to “get”.

In 2016, Amazon was found liable for unauthorized in-app purchases made by the children of mobile phone users. The lawsuit was brought in 2014. The Federal judge determined that Amazon was liable because it did not give sufficient warning to its customers about charges associated with free apps.

App developers often incorporate “in-app purchasing” into their free apps in order to upgrade or customize users’ gaming experiences. These can be seen in the form of additional gaming coins, extra levels, or lives. The problem occurs when parents downloaded apps onto their kids’ devices using their username and password. The child then has access to saved billing information. Amazon system allowed any person approximately 15 minutes to an hour

to spend without having to re-enter information once they had got in with the password for the device (Evans 2016).

#### *2.2.5.22 Common law cases: Conclusion*

The conclusions that can be drawn from the cases above are:

1. Consumers do not share the same perceptions as marketers with regard to what constitutes misleading conduct.
2. There is fine line that separates what may and what may not be considered as puffery. Overstepping the boundary can be a costly exercise.
3. Disclaimers and fine print do not make the representation any less misleading.
4. Pictorial representations are equally misleading as descriptive words used.
5. Partial truths do not make advertisements any less misleading.

The nature of puffery and its “subjective-versus-objective” element have made judges go in many different directions when pronouncing whether puffery has occurred. John Howard and James Hulbert, in their summary of testimony given before the FTC'1971 Hearings on advertising, concluded that exaggerations and overstatements in messages have contributed to an artificial rise in consumer expectations, and recommended that the same legal requirements be applied to puffery claims as applied to other claims (Bergh, Reid & Leonard 1979).

Hoffman (2006) makes some interesting observations on the nature of the puffery defence and judicial decisions made on it in the United States, which are equally pertinent in Australia:

- a) When puffery is extensively used, the result is that consumers do not get to exercise informed, intelligent choice, but their selection has to be made amongst competing untruths, deceptions and misleading comparisons.
- b) The puffery defence protects defendants whose speech is of a type capable of being falsified. The question of falsifiability is one of law, and regulators and courts decide whether it is puffery by drawing a line between falsifiable and non-falsifiable claims. These regulators do not use data to determine the difference, but define the defence in a categorical way: as claims that consumers would not take seriously because they were incapable of being measured.
- c) This is based on certain assumptions:

1) It is possible to distinguish factual from non-factual speech by looking at the speech itself.

This assumption causes problems because neither regulators nor courts consider empirical evidence about which claims imply facts. This results in a host of decisions in which relatively similar language used receives different judicial outcomes. Some examples of this are:

- Advil's claim that it, "like Tylenol", "doesn't upset ... [the] stomach", held to be not puffery, because the court believed the statements would be deemed by consumers to be a factual comparison with other brands.
- A motor-oil company's claim to provide "longer engine life and better engine protection" was held to be not puffery (*Castrol Inc v Pennzoil Company and Pennzoil Products Company* 1993, No. 92-5353.61 USLW 2516, 1993-2 Trade Cases P70,460, 25 U.S.P.Q.2d 1666).
- Bayer's statement that it made the "the world's best aspirin" that "works wonders" was held to be puffery.
- A videogame manufacturer's claiming of having "The Most Advanced Home Gaming System in the Universe" was deemed to be puffery (*Atari Corp. v. The 3DO Company* (ND CA 1994) 31 USPQ2d 1636, 1994 WL 723601).

2) Reasonable consumers are unlikely to be misled by claims that are incapable of being measured. It assumes that reliance placed by consumers on claims made is not induced by general assertions but only specific ones.

3) If it is discovered that the puffery has been used for the purpose misleading consumers, then it becomes actionable.

The inconsistency of application of the puffery defence creates uncertainty for promoters who use puffery, and also brings into question the entire regime of fraud regulation. The inability to coherently draw lines separating puffery from non-puffery is troublesome.

Simonson and Holbrook (1993) compiled a dataset of opinions about puffery from 1900 to 1993. By applying a statistical-regression model, they made the following conclusions:

- Expert sellers were less successful when arguing that their speech was mere puffery.
- Expert buyers were less successful in asserting warranty claims.

- Buyers with opportunities to inspect goods were less likely to prevail in their warranty claims.
- The puffery defence was less successful in contracts involving purchasers of goods than contracts involving purchasers of services.
- Makers of new goods were more successful when using puffery than makers of established products.
- Situational circumstances of the case were more likely to dictate the success of the puffery defence rather than the content of the speech in the claim made.

An independent examination of a number of warranty cases support Simonson and Holbrook's empirical study, and they are listed below:

- In *Guess v. Lorenz*, 612 S.W.2d 831 (Mo. Ct. App. 1981), a statement that "the car is in good shape" was held to be too general and thus not an express warranty of the car's condition.
- In *Wiseman v. Wolfe's Terre Haute Auto Auction, Inc.*, 459 N.E.2d 736 (1984), the statement of the seller that his truck was "road ready" was held to be an express warranty and not just an opinion. In so holding, the court looked at *Kemp v. Mays* (1920) 73 Ind. App. 214, 127 N.E. 156, where the court held that a seller's statement that the hogs being sold were "all right" was an express warranty.
- In *Roth v. Ray-Stel's Hair Stylists Inc*, 18 Mass. App. Ct. 975, November 1, (1984), a woman received a warranty, and not a puff, when her hair bleaching experience resulted in damage and loss of hair. Much of the court's analysis was based on subjective determinations, such as the plaintiff's vulnerability and the actual bargaining position of both parties.

Another observation about the puffery defence is that it is allowed because it is merely a statement of opinion by sellers about their products, and there would be no way to prove those opinions as having any form of truth in them. If we examine the law relating to Misrepresentation in common law under the Law of Contract, we find, however, that opinions made by sellers can still become misrepresentations. A statement of opinion cannot amount to a misrepresentation unless:

- The representor does not hold a genuine belief in the opinion (fraud).
- The representor has no facts to support such a position (*Fitzpatrick v Michel* 1928, 28 SR (NSW) 285).

The Plaintiffs in the above case entered a contract to lease flats from the Defendant. The Defendant made a representation that the flats would be able bring in 6 guineas a week (if sub-let), but that turned out to be false. They brought an action for misrepresentation. The appeal was dismissed. It was not a statement of fact by the landlord.

However, it is worth noting that, when a statement of opinion is made, it does allude to the fact that the person making the statement holds that opinion and can imply that the person has facts known to him that can possibly justify him/her having that opinion. It does not amount to a fraudulent misrepresentation when an honest opinion stated turns out to be false, but it can amount to a breach of warranty.

- It is unreasonable for the representor to hold the opinion based on their knowledge of the subject matter (*Bisset v Wilkinson* 1927, AC177).

Bissett had made a contract with Wilkinson to purchase two plots of land from him, and during the sale had asked Wilkinson how many sheep he thought the land could hold. Wilkinson expressed an opinion that, if the land was developed well enough, it could hold 2000 sheep. This turned out to be untrue, and thus Bissett sued Wilkinson. The Privy Council held that it was not a misrepresentation because Wilkinson had never farmed sheep on the land and thus did not have special knowledge on the opinion he had given.

- The person who stated the opinion had exclusive possession of facts relating to the opinion and it was not reasonable for the person to state that opinion based on what was known to that person (*Smith v Land & House Property Corp* 1884, 28 Ch D 7).

The plaintiff advertised a hotel for sale, writing that the hotel was rented to a “most desirable tenant” at the moment. The defendant agreed to buy the hotel, and then it was discovered that the tenant was bankrupt. The defendant refused to pay, and the plaintiff sued for specific performance whilst the defendant sued for misrepresentation.

The court ruled that a statement of opinion made can often involve a statement of fact. If one party knows more about the facts than the other party, then a statement of opinion by one who knows the facts can be deemed to be a statement of fact, for it impliedly states that his opinion is based on the facts that are known to him. A statement by the landlord that his relations with his tenant are satisfactory tells us that it is facts within his knowledge that render his opinion reasonable. Such a statement of opinion can amount to an assertion that nothing has occurred in the tenancy to show that the tenant was an unsatisfactory one. That is an assertion of a specific fact. The Court held that the contract could be rescinded.



Table 2.2 provides a summary of the statutes, codes and case laws that were examined to help answer the primary question in this research, and the first secondary research question. The case laws have been arranged in chronological order.

The next area that was reviewed is the regulation of puffery in other countries. This was done to draw a comparison and to see whether the position in Australia is similar to that of other countries. Standardization of law across countries will definitely help in light of globalisation and e-commerce.

**Table 2.2 Summary and relevance of Legislation examined**

| Statutes & Codes  | Case laws  | Relevance to thesis   |
|---|--|---|
| Section 2 ACL<br>Section 18 ACL<br>Section 29 ACL<br>Section 33 ACL<br>Section 35 ACL<br>Section 15B<br>Electronic Transactions Act 1999<br>Trade Practices Act 1974<br>Australian Broadcasting Corporation Act 1983<br>Therapeutic Goods Code<br>Alcoholic Beverages Advertising Code<br>Weight Management Industry Code<br>The Advertising Code | Specsavers Pty Ltd v Luxottica Retail Australia Pty Ltd [2013] FCA 648<br><br>Swisse Vitamins Pty Ltd v The Complaints Resolution Panel (2012) FCA 536<br><br>Seafolly Pty Ltd v Madden [2012] FCA 1346<br><br>Proctor & Gamble Australia Pty Ltd v Energizer Pty Ltd (2011) FCA 1347<br><br>ACCC v Singtel Optus Pty Ltd (No 4) (2011) FCA 761<br><br>ACCC v Global One Mobile Entertainment Ltd (2011) FCA 393<br><br>ACCC v C I & Co Pty Ltd (2010) FCA 1511<br><br>Smythe v Thomas (2008) NSWSC 844<br><br>Alami v Langov & Ors [2008] NSWSC 812<br><br>Lymquartz Pty Limited v 2 Elizabeth Bay Road Pty Limited [2007] NSWSC 457<br><br>ACCC v Telstra Corporation (2007) FCA 1904<br><br>Bembridge v Just Spectacles Pty Ltd [2006] WASC 18<br><br>eBay International AG v Creative Festival Entertainment Pty Ltd (2006) FCA 1768<br><br>ACCC v Cadbury Schweppes Pty Ltd (2004) ATPR 42-001<br><br>Gillette Australia Pty Ltd v Energizer Australia Pty Ltd (2002) 193 ALR 629<br><br>ACCC v Target Australia Pty Ltd [2001] FCA 13261<br><br>Campomar Sociedad, Limitada v Nike International | These Statutes, and Codes answer the Primary Research Question:<br><br><i>Is the current regulation of puffery in online advertisements adequate?</i><br><br>and the first Secondary Research Question:<br><br><i>What is the nature and extent of puffery regulation in online advertisements?</i> |

|  |   |  |
|--|---|--|
|  | <p>Ltd (2000) 202 CLR 45</p> <p>General Newspaper Pty Ltd vs. Telstra Corporation (1993) ATPR41-274)</p> <p>Taco Company of Australia Inc. v Taco Bell Pty Ltd (1982) 42 ALR 177</p> <p>Parkdale Custom Built Furniture Pty Ltd v Puxu Ltd (1982) 149 CLR 191</p> |  |
|--|---|--|

### ***2.2.6 Global analysis of online legal frameworks***

Recent developments in International Law or laws of other countries can bring about change and amendment to existing laws in Australia. Countries can be parties to a treaty or convention that is binding at international law. These agreements are not strictly binding on the internal laws of a country but can have a large influence over legal developments within a country. Less binding international ‘declarations’, such as the *Declaration on the Rights of the Child (1959)*, can also have a broad influence on the legislative direction of a government (*Changing the Law, n.d*).

In light of the possibility of this avenue being a harbinger of change, an examination of the law relating to puffery in advertisements in other countries was carried out. A study conducted by the Global Advertising Lawyers Alliance in 2015 was looked at to derive some interesting input. The Global Advertising Lawyers Alliance (GALA) is the leading network of advertising lawyers in the world. With firms representing more than 80 countries, GALA provides the premier worldwide resource to advertisers and agencies seeking solutions to problems involving the complex legal issues affecting today’s marketplace. The study examined the law relating to advertisements in 56 countries from 6 continents. 33 of the 56 countries had laws that allowed puffery usage, but the other 23 countries show evidence of inroads being made into puffery usage that evidence restriction in its usage. The differing positions with regard to puffery usage in advertisements of the 23 countries are presented below. The information supplied is in response to the question as to whether there are certain types of advertising messages that do not require substantiation (i.e. puffery). Following the details of the law in each country, an analysis has also been made and presented by the researcher.

### *2.2.6.1 Turkey*

Article 61(2) Law on Consumer Protection (2013) states that it is essential that commercial advertisements conform to the principles adopted by the Board of Advertisement, public morality, public order, and personal rights, and are honest and true. Under Turkish Law, advertisements are regulated under Law on Consumer Protection (2013) Law No: 6502. Acceptance Date: 7/11/2013.

Substantiation is required for all advertising messages. This is as per Article 61(6) which states that advertisers must prove the material claims made in their commercial advertisements. Article 13 of the Advertising Regulations (Regulation on the Principles and Procedures of Commercial Advertisements and Announcements (The Advertising Regulation, published in the Official Gazette dated June 14, 2014, numbered 25135) requires the advertiser to prove any material claim made in their advertisements.

Advertisements where the material claims are not proven are deemed misleading advertisements by the Advertisement Board. Article 7(c) of the Advertisement Regulation provides that "advertisements shall not contain expressions or images that could mislead the consumers directly or indirectly in terms of bringing forth false impressions by providing incomplete information, leading to confusion or presenting exaggerated claims" (Gurpinar 2016).

The Law on Principles of Radio and Television Broadcasts (the Turkish Broadcasting Law, numbered 6112), also regulates the advertisements broadcast via TV, radio and on demand services.

The Advertisement Board is very strict on advertisers who use puffery or make vague claims about their products and services. The Advertisement Board imposes fines for usage of superlative statements such as "best", "newest", "cleanest" and "freshest". The Board requires that claims and assertions in comparative ads be based on "scientific works" or "test results" taken from certain institutions such as state universities or internationally accredited labs or scientific centers (Advertising Law Book 2015, p 735).

The laws highlighted above show a strict need for proving any claims made, and Article 7(c) of the Advertisement regulation brings within its ambit the usage of puffery. The Article clearly states that advertisers should not use exaggerations in their advertisements. The fact that fines are used for usage of superlative statements makes any usage of puffery either too

difficult or quite impossible. Turkey does appear to have outlawed puffery by its regulations, and is certainly the country that has taken the toughest stand against puffery usage.

#### 2.2.6.2 Kenya

Section 12 (1) Consumer Protection Act, No. 46 of 2012 states that, it is an unfair practice for a person to make a false, misleading or deceptive representation. Section 12(2) states that, without limiting the generality of what constitutes a false, misleading or deceptive representation, the following is included as false, misleading or deceptive representations:

*(n) a representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive.*

All descriptions, claims and comparisons made in advertisements are to be substantiated by advertisers prior to acceptance of the advertisement for publication and transmission. The evidence used for substantiation must come from a credible independent research entity recognised by the Advertising Standard Body Kenya. Where in-house research is conducted, such research results must be evaluated and confirmed by a credible independent research entity. The responsibility of substantiation lies on the advertiser, and remains even when handling of advertising is delegated to an agent. All advertisements require substantiation (Advertising Law Book 2015, p 434).

Here, too, we can see quite a tough stand taken against puffery usage. Section 12(2)(n) of the Consumer Protection Act 2012 stipulates that usage of puffery or exaggeration can run foul of the law if it is deemed to be misleading. It is interesting to note that taking a tougher stand on exaggerations helps to make the decision as to whether it should be used an easier one. The law seems to link puffery with misleading practice, and credibility in claims made is tested stringently.

#### 2.2.6.3 Nigeria

In Nigeria, advertising is regulated by the Advertising Practitioners Council of Nigeria (APCON), which was established pursuant to the Advertising Practitioners (Registration Etc.) Act, Cap A7(APA), Laws of the Federation of Nigeria, (LFN) 2004. Any form of communication to the public, or a target audience through the media, which aims to impart information about products and services and which is paid for by an identified sponsor is regarded, under the Nigerian Code of Advertising Practice and Sales Promotion (NCAP), as advertising. The basic regulatory framework for advertising in Nigeria includes APA and

NCAP. As a result of the powers conferred on the APCON under the APA, the APCON enacted the NCAP to control all aspects of advertising.

Article 23 of the NCAP states that substantiation is required for all claims, descriptions and/or illustrations in advertising messages. Advertisers are prohibited from engaging in product hype or any form of product promotion that employs the use of the superlative or unsubstantiated or misleading claims, testimonials or descriptions. The NCAP directs that consumers must be given all relevant information that is likely to affect their decision-making (Advertising Law Book 2015, p 528).

Usage of puffery is made a little more difficult if prohibitions are present for usage of superlatives in promotions. This does not rule it out, but the exaggeration must take a more visual form or words used have to be carefully chosen. Puffery usage stretches the truth, so it will be quite a task to come within the requirement of the NCAP that consumers must be provided with all relevant information to make a rational decision. Quite a lot of attention in puffery usage is normally placed on what is not to be disbelieved, and little is actually directed towards highlighting the essential information needed to influence decisions to purchase.

#### *2.2.6.4 Malaysia*

Advertising is governed through the Advertising Standards Authority (ASA). The Advertising Standards Authority of Malaysia (ASAM) ensures that advertising complies with the Malaysian Code of Advertising Practice (MCAP) and the Malaysian Communications and Multimedia Content Code (CMCF). The Trade Description Act 1972 states that it is an offence for any person to use or to supply or offer any goods that contain false description. False description of goods in and by advertisement is also regulated by the Direct Sales Act 1993. The Consumer Protection Act 1999 was amended in 2010 and gave the Ministry of Trade the power to take action against those who produce false and misleading advertisements. Sections 8-10 deal with misleading and deceptive practice in advertisements in relation to the claims made about products (Consumer Protection Act 1999).

Although puffery is permissible, the law is restrictive on its usage. The laws state that, advertisements should not contain any statements or visual presentation which, directly or by implication, omission, ambiguity, or exaggerated claim, are likely to mislead the consumer about the product advertised, the advertiser, or about any other product or advertiser (Advertising Law Book 2015, p 472). Obvious hyperbole is permissible provided that it does not show the product to be superior or provide it with superlative status.

Once again, we find legislation that regulates exaggerated claims to a certain extent. The recognition of exaggeration in the form of puffery as being in need of regulation shows an acceptance that puffery can also mislead. Here, we find the law being restrictive when puffery is used beyond just highlighting virtues of a product, but when it is used to show the product as being better compared to other products.

#### *2.2.6.5 Belgium*

The Belgian Act of 6 April 2010 on Market Practices and the Protection of Consumers (MPA) regulates advertising claims. Since the codification of the Code on Economic Law in 2014, the MPA and other laws on Market Practices and Consumer Protection became Book VI, Code on Economic Law (Advertising Law Book 2015, p 60).

The provisions are a mere implementation into Belgian law of the European Directives 97/7/EG and 97/55/EG on advertising and European Directive 2005/29 (Advertising Law Book 2015, p 67).

The Market Practices Book of the Code on Economic Law states that the usage of superlatives or hyperbole is permitted provided it is not used in a comparative context and it can be assumed that the consumer will understand that it is puffery. If the puffery used is accompanied with supporting evidence, then the advertisement will be misleading if the substantiation is insufficient (Advertising Law Book 2015, p 68).

Interestingly, the regulation here appears to talk about consumer understanding of what constitutes puffery. When puffery is used in a comparative sense and with supporting evidence, it becomes harder to believe that the claim is not an exaggeration. Thus, the requirement of substantiation helps draw the boundary lines a bit more clearly.

#### *2.2.6.6 Mexico*

Federal Consumer Protection Law (Chapter III) and Regulations of the Federal Law on Consumer Protection 2004 set out the administrative proceedings against misleading advertising and commercial information. This Law is enforced by the Consumer Protection Agency. Article 32 of the Federal Consumer Protection Law states that all advertising must be truthful and verifiable. The advertisement must be free of text, dialogue, pictures, sounds or other descriptions that lead or may lead to mistake or confusion by being deceptive or unfair. Decisions on whether an advertisement is misleading will be made on a case-by-case basis (Advertising Law Book 2015, p 485).

Although not outlawing puffery, the law here seems to be tight, by imposing high standards of truth and verifiability in claims made in promotions. There do not appear to be clearly defined boundaries. This can lead to uncertainty but also serve to put promoters on alert to ensure they do not overstep the restrictions placed by law and defined by case law.

#### 2.2.6.7 Canada

Advertising is regulated at both the federal and provincial levels in Canada, as well as through self-regulatory bodies. Federal legislation governs deceptive marketing practices, including all manner of representations such as pricing, promotions, testimonials, telemarketing, and bait and switch tactics. Provincial consumer protection legislation governs deceptive advertising and marketing practices. The Competition Act 1985 (R.S.C., 1985, c. C-34, Act current to 2017-01-17 and last amended on 2015-03-09) governs misleading representations. The primary self-regulatory system in Canada is Advertising Standards Canada (ASC).

Section 74(1)(1) states, that a person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

*(a) makes a representation to the public that is false or misleading in a material respect (Justice Laws Website, p 70).*

All advertising is subject to substantiation, as advertising claims are much more likely to be interpreted in a literal way. Advertisements containing a puffery claim must not create an inaccurate or erroneous general impression in the minds of consumers (Advertising Law Book 2015, p 105).

The approach of giving literal interpretation to advertisements can make it more difficult to use puffery. Puffery thrives on the opposite of this approach. The claims are not to be taken literally. Furthermore, the threshold is also set in the form of the advertisement not creating a wrong impression on the minds of purchasers. This gives promoters very little space to maneuver if they want to use puffery.

#### 2.2.6.8 China

The Advertising Law 1995, the 1987 Regulation on the Administration of Advertisements, and numerous regional and subject-specific regulations, govern advertising in the People's Republic of China. The Advertisement Law of the People's Republic of China of October 27,

1994, was amended and revised for the first time by the Standing Committee of the People's Congress on April 24, 2015, and came into force on September 1, 2015.

Chinese advertising law stipulates that even puffery used in advertising claims requires substantiation. Only statements or representations that can be supported by accurate facts are legitimate. Advertising Law requires that advertising content published in the PRC be truthful, lawful and not misleading (Articles 3 and 4 of the Advertising Law of the People's Republic of China 2015).

Chapter 2, Article 9(3) of the new law prohibits the “use of words such as ‘national-level’, ‘highest’, ‘the best’” and other such comparative terms in advertisements (HFG Law & Intellectual Property 2016). The enforcement of this ban on superlatives is strict. This law seems to make the usage of puffery very difficult, if not impossible.

Online marketplace providers, or “e-trading” platforms, are responsible for the conduct of sellers using that platform. The online marketplace hosting the seller has to provide contact details to consumers seeking compensation for defective goods or services purchased from an online seller. A failure to do this will make the trading platform liable to compensate the consumer. Online marketplaces will also be liable where they had knowledge that the seller using the platform is engaged in conduct harmful to consumer interests. These measures help to ensure seller information is accurate and that there is fair dealing (Paterson, J 2014).

The law in China takes a rather strong stand against puffery by requiring puffery to be substantiated and having a prohibition on usage of superlatives in promotions. This is recognition of the fact that puffery can also be misleading and certainly does have an impact on consumers. The extension of liability to online market providers shows that their policy is far-reaching.

#### 2.2.6.9 Colombia

The following laws regulate advertising in Colombia:

*a) Law 1480 of 2011 (Consumer Protection Law) introduced mandatory guidelines to regulate truthfulness of advertising. Misleading advertising is expressly forbidden.*

*b) Law 260 of 1996 (Unfair Competition Law): Under this Law, certain behaviors involving advertising may be deemed unfair competition (e.g. misleading comparative*



*advertising). Advertising of certain specific goods and services is also regulated (e.g. cigarettes, medicines, tourism, infant formula, etc.)*

*c) The Self-Regulatory Code on Advertising, amended on October 16, 2013 (Advertising Law Book 2015, p.149).*

Puffery can be used provided it does not mislead the consumer into believing the claim literally. Subjective opinions can be given subject to the need to respect the principles of advertising (Advertising Law Book 2015, p 149).

The question that needs to be asked is to what extent is puffery believable; and also, the extent to which the advertisement may have gone on to depict the properties of the product that may have not been believed but where belief may still lie that truth does exist but to a lesser extent. For example, a consumer does not believe that Red Bull makes the consumer able to fly but that it should certainly improve the performance level of a consumer. This can also be called misleading. Opinions of others can also have weight in influencing a decision. The laws here seem to be targeting these abovementioned areas in their bid to regulate puffery.

#### *2.2.6.10 Costa Rica*

The laws that regulate advertising are the Consumer Protection Law 1994, the Civil Code, the General Health Law, the Law to Protect the Image of Women, the Criminal Code, and laws applicable to specific products.

Substantiation is required for all advertising claims, express or implied. The test for discerning whether an implied claim is misleading is an objective one based on the global impression the claim creates. The concept of puffery has been applied in some cases by looking at the type of consumer that the advertisement is targeted at and whether those consumers would be misled (Advertising Law Book 2015, p 159).

The test for deciding whether an advertisement is misleading seems to be quite broad since it is based on the general impression it creates on a consumer. This also echoes the 'target audience' test implied by Australia's section 18 of the ACL. It, however, seems to be both objective and subjective in its application. When we talk of 'global impression', that would perhaps put the threshold of understanding a little lower, since it has to be examined in light of all levels of understanding and familiarity. The 'target audience' test seems more specific to the knowledge possessed by those in the particular category, and this can be quite high if it

falls within a target audience that is expected to have a higher level of knowledge specific to the category they fall into. Thus, the test appears to be both strict but also flexible.

#### *2.2.6.11 India*

There are several Acts that deal with advertising. One that covers our topic of discussion is the Consumer Protection Act 1986. The Act's objective is to promote and protect the rights of consumers. The Indian advertising market as a whole is regulated and controlled by a self-regulatory organization called the Advertising Standards Council of India (ASCI) (Advertising Law Book 2015, p 343).

Section 6 of the Act grants consumers the right to be informed about the quality, quantity, potency, purity, standard and price of goods or services. Section 2(1)(r) of the Act, in defining the term "unfair trade practice", covers the gamut of false advertisements including misrepresentations and false allurements (Advertising Law Book 2015, p 343).

The ASCI, established in 1985 adopted a Code for Self-Regulation in Advertising. Section 1 of Chapter I of the Code states: "Advertisements must be truthful". All descriptions, claims and comparisons that relate to matters of objectively ascertainable fact should be capable of substantiation. Section 6 of Chapter I of the ASCI Code states: "Obvious untruths or exaggerations are permissible provided that they are clearly to be seen as humorous or hyperbolic and not likely to be understood as making literal or misleading claims for the advertised product". The judgment of a reasonable person is examined to decide whether the claim is more than just puffery and is actually a misleading claim (Advertising Standards Council India).

India appears to have adopted a reasonable person standard for judging whether a claim is mere puffery. The reasonable man standard has been argued to be one that expects a higher level of knowledge and understanding (Clarke 1990). Thus, misleading practice cannot be achieved very easily.

#### *2.2.6.12 Ireland*

A mixture of legislation, case law and self-regulatory codes regulate advertising in Ireland. There are a variety of consumer protection laws such as the Consumer Protection Act 2007 and the distance-selling regulations. There are also industry specific legislation and the Advertising Standards Authority of Ireland Code of Standards for Advertising, Promotional and Direct

Marketing in Ireland (ASAI Code 2016). Certain industries also have their own regulatory codes relating to advertising in that specific industry (Advertising Law Book 2015, p 354).

Section 4(1) of the ASAI Code states that marketing communication should not mislead, or be likely to mislead, by inaccuracy, ambiguity, exaggeration, omission or otherwise. Section 4(2) goes on to clarify that obvious untruths or deliberate hyperbole are permissible although they cannot alter any material facts. Section 4(9) stipulates that all claims should be capable of substantiation (Advertising Standards Authority for Ireland).

Section 4(1) brings puffery within its ambit of regulation and makes it subject to legal scrutiny.

#### *2.2.6.13 Israel*

The Israeli Parliament regulates advertising by various laws that take the form of primary legislation. The Consumer Protection Law 1981 (CPL) empowers the Minister of Industry and Commerce to set regulations for consumer protection. Pursuant to the CPL, the Minister has enacted numerous regulations, such as the Consumer Protection Regulations (Advertisements Targeted at Minors) 1991. The courts are the primary bodies that enforce and interpret the various advertising laws and regulations (Advertising Law Book 2015, p.370).

Competitors can challenge advertisements containing puffery that border on false statements. Section 7(b) states:

*If the advertisement alleges facts as to the properties of the commodity or service or as to the findings of an examination carried out thereon, the Commissioner may require the person on whose behalf the advertisement is made or the person who transmitted the material for publication and thereby causes it to be published to produce evidence proving such facts. If the person does not produce evidence as aforesaid to the satisfaction of the Commissioner, this shall be prima facie evidence that the advertisement is misleading. (Consumer Protection Law, 1981).*

The courts and other relevant bodies are less forgiving when examining puffery targeted at minors. This is prohibited by the Consumer Protection Regulations (Advertisements Targeted at Minors 1991) to advertise or market in a manner that takes advantage of the consumers' innocence, beliefs, imagination and lack of experience. The Second Authority Ethics Rules explicitly prohibits advertisements that contain "exaggerations that exceed vague praises" (Advertising Law Book 2015, p 375).

The law here is keeping a tight rein over puffery to ensure that it does not cross over into misleading territory. It is interesting to note that exaggerations can also have portions that are believable. The whole ad may be outlandish, but it can also at the same time give a product some level of distinction and recognition. The laws also recognize that extra protection is needed when it comes to puffery and its effects on minors, a category of person that may not be able to make a distinction between what is true and what is exaggeration.

#### *2.2.6.14 Jamaica*

Various Acts, Regulations and Codes regulate advertising in Jamaica. The Consumer Protection Act 2005 and the Fair Competition Act 1993 regulate matters pertaining to false or misleading advertisements and are administered by the Consumer Affairs Commission and the Fair Trading Commission. The self-regulation systems for advertising are based on the Jamaican Code of Advertising Practice (JCAP) and the Code of Marketing Communication Practices (MCAP), which complement current advertising laws.

Misleading advertising is prohibited under Section 37 of the Fair Trading Act, which requires that advertisements be clear and unambiguous. Section 30 of the Consumer Protection Act of Jamaica (CPA) provides that:

*Section 30(1) No person shall, in the course of trade or business, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services, make false and misleading representations (Jamaica's Guide to the Law).*

Article 4.2.3 of JCAP states that, “*obvious hyperbole, which is intended to attract attention or to amuse is permissible provided that it is not likely to be taken as a positive claim to superior or superlative status*”, as it would be seldom possible to substantiate general claims made by advertisers. Article 4.3.2 stipulates that, “*consumers should not be led to overestimate the value of goods whether by exaggeration or through unrealistic comparisons with other goods or other prices*” (Advertising Law Book 2015, p 411).

Exaggeration is used to make a claim more noticeable and enticing. Familiarity with a product will always give us a true picture of its capabilities or features. This is not the case when there is little or no knowledge of a product. Thus, an exaggeration made about a product may not be understood to be an exaggeration. Lack of understanding makes anyone a poor judge of the truth. The law here has been drafted to ensure this disparity does not cause loss to

be suffered by the consumer. Comparisons with other products too serve to delude sometimes. Exaggerating about a product and making a comparison of that good with a higher end good may only serve to persuade the consumer that the advertisement is not really true, but the fact that the lower end product was put in the same league as a higher end product may give a consumer a heightened estimation of the lower end product's status.

#### *2.2.6.15 New Zealand*

Advertising in New Zealand is regulated by a combination of self-regulatory bodies and legislation. The Advertising Standards Authority (ASA) self regulates advertising in New Zealand. It issues various Codes and guidance notes, and provides a mechanism for complaints against advertisements to be made and heard. The Fair Trading Act 1986 (FTA) is the primary act controlling marketing and advertising in New Zealand (Advertising Law Book 2015, p 492).

Section 9 imposes a general prohibition on conduct in trade that is misleading or deceptive or is likely to mislead or deceive consumers (New Zealand Legislation).

Section 10 states: "No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for a purpose, or quantity of goods" (New Zealand Legislation).

Section 12A deals with unsubstantiated representations by stating:

*(1) A person must not, in trade, make an unsubstantiated representation.*

*(2) A representation is unsubstantiated if the person making the representation does not, when the representation is made, have reasonable grounds for the representation, irrespective of whether the representation is false or misleading (Advertising Law Book 2015, p 492).*

Section 12B states that, "in proceedings concerning a contravention of section 12A, and in assessing whether a person had reasonable grounds for a representation, a court must have regard to all of the circumstances, including (f) the actual or potential effects of the representation on any person" (Advertising Law Book 2015, p 492).

Puffery can fall foul of the provisions of the FTA if there is use of inaccurate language that can influence decision-making (Advertising Law Book 2015, p 498).

Section 12B seems to be taking a subjective slant to the assessment of the conduct by the advertiser on the consumer. The nature of puffery is based on hype about a product, and hype does normally fall within inaccurate language. Section 12A also makes a claim unsubstantiated even if it was not misleading, so long as the person making the statement had no basis for making that statement. This seems to be an indirect way of stating that puffery is not really tolerated.

#### *2.2.6.16 Panama*

There are four principal areas of law and regulation regarding advertising in Panama, but the most relevant to our discussion is the Consumer Protection Law No. 45 of 2007. The Authority for Consumer Protection and Competition Defense (ACODECO), whose authority was established under Law No. 45 of 2007, closely monitors advertising. Under Law No. 45, any type of publicity, whether promotions of products and services, advertisements or publicity campaigns, must be true, authentic, visible, legible, truthful and without ambiguity (Advertising Law Book 2015, p 555).

According to Law No. 45, the manufacturers, importers and distributors of products and services are responsible for the suitability, quality, and truth of the commercial advertising and the qualities attributed to the products and services (Advertising Law Book 2015, p 555).

Advertisements that contain exaggerated portrayal of the characteristics and information of a product or service shall be considered misleading if it causes the consumer error or confusion (Advertising Law Book 2015, p 555).

In general, the law does not exempt any practice from being truthful. Advertisers are advised to stick closely to the truth and to avoid puffery (Advertising Law Book 2015, p 555). Consumers are also to be given all necessary information to make purchase decisions. Failure to do so may cause advertisements to be deemed misleading (Advertising Law Book 2015, p 555).

Puffery is used to inform, influence, promote, portray an image, and to put a product in its best light. Its very nature is to paint a picture and convey information in an indirect manner. What is highlighted is an exaggeration. It can be considered to be telling an untruth to inform of a truth. The question is, what exactly is the truth being conveyed and does it ring clear without causing confusion despite the puffery used. Promotions that use puffery do not always give the necessary information to make a purchase. The law in Panama seeks to bring advertisers as close as possible to the truth and dissuade the use of puffery.

#### 2.2.6.17 Russia

The following basic laws regulate advertising and advertising claims: the Federal Law on Advertising (2006), the Federal Law on Drug Commerce (2010), the Fundamental Principles of Legislation for Culture (1992), the Consumer Rights Protection Law (1992), the Federal Law on Fundamental Guarantees of Rights of the Children (1998), and the Law on Mass Media (1991). Article 5.1 of the Federal Law on Advertising 2006 states that all advertising messages must be reliable, trustworthy and based on some public data (e.g. research or awards) (Advertising Law Book 2015, p 639).

What is a common thread in most legislation around the world is that implicit need for advertising to be reliable, truthful and trustworthy. Most also require substantiation and information conveyed to be backed up by proof. The only difference relates to the extent to which puffery is exempt from these requirements. The law here tries to keep the gap between truth and misleading practice as small as possible.

#### 2.2.6.18 Singapore

The advertising sector in Singapore is a self-regulating system. The Advertising Standards Authority of Singapore (ASAS) oversees and regulates advertising activities. There are numerous advertising guidelines, including the Singapore Code of Advertising Practice 2008 (SCAP). This code is administered by ASAS. In addition, there are specific statutes regulating the advertising of certain products and services, such as the sale of tobacco and pharmaceuticals (Advertising Law Book 2015, p 650).

The SCAP states that substantiation is required for all advertising claims, including those containing puffery (Advertising Law Book 2015, p 650). Section 5(1) states that advertisements should not mislead in any way by inaccuracy, ambiguity, exaggeration, omission or otherwise. More specifically, advertisements should not:

*(a) Misrepresent any matter likely to influence consumers' attitude to any product, advertiser, or promoter (Advertising Standards Authority Singapore).*

There is a similar type of approach here with regards to exaggeration as that adopted by Jamaica, Ireland, Malaysia and Turkey. The inclusion of exaggeration as being subject to regulation once again shows recognition that puffery needs to be curtailed.

#### 2.2.6.19 Spain

The General Advertising Act (Law 34/1988 of 11 November) and the Unfair Competition Act (Law 3/1991 of 10 January) govern general advertising law. There are also specific laws regulating certain industry sectors. For example, the General Consumer Protection Act (1984) governs the consumer sector. The self-regulatory organization is called Autocontrol.

Article 5(1) Amendment of the Unfair Competition Act, Law 3/1991 of 10 January 1991 (Law 29/2009 of 30 December 2009 amending the statutory regime of unfair competition and advertising in order to enhance protection afforded to consumers and users), states:

*‘Any conduct entailing false information or information that although true, by virtue of its content or presentation, leads or could lead its targets to an error in judgment and is liable to alter their economic behaviour is considered misleading and hence unfair...’*  
(Official state Gazette).

Advertising should be analyzed according to the overall message transmitted to the recipient. The message has to be interpreted from the perspective of an average, normally informed and reasonably observant consumer (Advertising Law Book 2015, p 689).

The law here adopts the reasonable man standard in terms of interpretation of the message. This, therefore, assumes that the consumer will have a slightly higher standard of knowledge than expected by Section 18 ACL. The wording of Law 3/1991 does cover puffery within its ambit, and warn against its potential misleading nature and that it can be subject to litigation.

#### 2.2.6.20 Sweden

The Swedish Marketing Practices Act 2008 (‘MPA’) and the Swedish Act on Name and Pictures in Advertising 1978 regulate advertising. Various statutory consumer protection laws also supplement the two Acts. There are also other statutory consumer protection laws such as the Swedish Consumer Sales Act or the Swedish Consumer Services Act. Substantiation is required for all advertising claims. Marketing shall be trustworthy and not misleading (Advertising Law Book 2015, p 704).

Section 8 of Marketing Practices Act 2008 states that marketing that is misleading, under any of the provisions of Sections 9, 10 or 12-17, is to be regarded as unfair if it affects or probably affects the recipient’s ability to make a well-founded transaction decision (World Intellectual Property Organization).



There are many factors that can cause a decision to be not well founded. Inaccurate information supplied, a short time to make decisions, lack of trustworthy reviews, and lack of background information on the product, are some of the reasons for this happening. Advertisements that are ambiguous also compound this uncertainty. The ambiguity can be caused by either inadequate information supplied or puffery used. The above sections prevent such situations being used to mislead consumers.

#### 2.2.6.21 Switzerland

One of the basic statutes governing advertising in Switzerland is the Federal Act on Unfair Competition (1986). Other laws applicable to advertising are the Trademark Act, the Copyright Act, the Data Protection Act, the Federal Law on Lotteries and Commercial Betting, and the Penal Code (Advertising Law Book 2015, p. 719).

Section 2 of the Federal Act on Unfair Competition (1986) states:

*‘Any behavior or business practice that is deceptive or that in any other way infringes the principle of good faith and which affects the relationship between competitors or between suppliers and customers shall be deemed unfair and unlawful.’ (World Intellectual Property Organization).*

3(d) states that, anyone who takes steps that are such as to cause confusion with the goods, works, services or businesses of others is considered to have committed a misleading act (World Intellectual Property Organization). Non-factual statements can still infringe the Act if the overall impression created by the advertisement is misleading.

Puffery is also being regulated to an extent, and this is dependent upon the impression created by the advertisement. This implies that even puffery is actionable if it causes a consumer to be misled.

#### 2.2.6.22 Ukraine

The basic law governing advertising claims in Ukraine is the Advertising Law (The Official Journal of the Verkhovna Rada No. 3480-IV (3480-15) of 23.02.2006, OJVR, 2006 No. 31, p.268). In addition to the Advertising Law, claims are generally addressed under the Consumer Protection Law, the Unfair Competition Law, the Safety and Quality of Food Products Law, and various industry specific regulations (Advertising Law Book 2015, p 763).

Article 1 of the Advertising Law states:

*‘unfair advertising’ means advertising which misleads or may mislead the consumers of advertisements, cause damage to persons, state or society as a result of inaccuracy, inauthenticity, equivocation, exaggeration, reticence, violation of requirements as for the time, place and method of dissemination (World Intellectual Property Organization).*

Advertisers must prove the accuracy, truthfulness and non-deceptive nature of any and all advertising claims without exception, including puffery. Failure in substantiation will result in the advertisement being deemed misleading and violating applicable laws (Advertising Law Book 2015, p 763).

Puffery is not spared the rod here. It is put up to justification and substantiation if the exaggeration is found to be causing confusion in the minds of consumers.

#### *2.2.6.23 Venezuela*

The National Constitution, the Organic Fair Price Act 2014, and the Law on Social Responsibility in Radio, Television and Digital Media (2004). regulate advertising in Venezuela. The Anti-monopoly, Anti-Oligopoly and Unfair Competition Act 2006 also has a chapter regulating acts of advertising that could be considered unfair competition (Advertising Law Book 2015, p 822).

Regulators do not favor puffery messages, and consider them potentially misleading from a consumer perspective. A restrictive approach is taken with regard to advertisements containing puffery (Advertising Law Book 2015, p 826).

The thin line that separates puffery from being a misleading practice is always the focus of regulators of the law. Venezuela, like many of the countries discussed above, takes a similar stand towards preventing puffery usage as much as possible and placing it within set limits.

#### *2.2.7 Summary of analysis*

1. There is clear recognition by the 23 countries that puffery has the potential to be misleading and thus laws have been put into place to curb its usage. The influence that an advertisement that uses puffery has on consumers cannot be denied. It is clear that puffery is effective and helps sell products. Huge budgets are set aside for promotions by marketers. The decision to use puffery is because it does work. The inroads made by the regulators, as reflected by the relevant laws in the 23 countries stated above, is evidence that this an area that should not go unchecked.

2. The effect that puffery has is more important than the actual words and images used. The ridiculous nature of the claims made does not detract from the fact that it could have a harmful effect on a consumer.
3. There are different standards of judgment on which the potential false impression is tested upon. The Reasonable Man standard is used by some of the countries, and this denotes that it would not be too easy to mislead a consumer by such practices like puffery since a consumer is expected to have good knowledge of a product and thus not be easily fooled. There are some countries that also have a subjective element in the judgment standard. The varying standards only show attempts at scrutinizing puffery and subjecting it to closer examination.
4. The fact that exaggeration is included as a potential misleading practice is indicative of the fact that puffery should be subject to substantiation just like any other potential misleading practice.
5. There is increasing awareness around the world as to the need for the law to shift the burden of caveat emptor from the buyer to the seller. There is recognition that the burden of caveat emptor is in no way fair to impose on the buyer in light of changing trends in marketing and purchasing methods.

The position taken by the countries listed above tell us that regulation of puffery is at varying levels. There are a number of countries that have extremely low tolerance for puffery usage and hence have regulated the area very stringently. Turkey is the strictest, with zero tolerance for puffery and laws preventing its usage. Other countries do tolerate puffery but draw the line to its usage if it does not fall within the boundaries set to curb misuse. Australia stands with these countries in respect that it allows puffery usage unless the claims fall into misleading territory with respect to verifiable claims. The fact remains that, if 23 countries, excluding Australia, have made inroads to puffery regulation, then that should provide an impetus for us to review our laws too. It is understood that some countries may require more stringent rules depending on their social, economic status, literacy levels and level of advancement of technology, but a consumer is a consumer, wherever they are. The advent of online shopping presents a challenge to all countries globally, as most countries have entered this domain at the same time. A consumer requires protection because he or she may be purchasing from a seller in another country and thus the protections become important. The stand taken by these 23 countries can be considered for the argument that some form of increased regulation may be needed in Australia too. It is obvious that an increased amount of

regulation has been put in so that the line between puffery and misleading advertisements can be drawn with more clarity. The increased level of regulation aids in preventing the problem and thus helps the regulation not end up being merely reactive. Prevention is better than the cure.

This completes this section of the literature review. The next component to be looked at is the Regulatory Bodies in Australia dealing with areas related to puffery, misleading practice and advertisements.

## **2.3 Australian Regulatory Bodies**

The regulatory bodies in Australia that deal with consumer protection are

- a) Australian Competition and Consumer Commission (ACCC); and
- b) Consumer Affairs.

Each state has its own regulatory body. For the purposes of this research, the focus will be on Consumer Affairs Victoria.

### **2.3.1 *The ACCC***

The ACCC provides protection for consumer by way of enforcing the provisions of the Australian Consumer Law in the event of breaches. To illustrate the extent to which misleading practices are an ongoing problem, the following data is from the ACCC website:

- In the past two years (2013-2014), the courts have ordered pecuniary penalties in 33 ACL cases, with penalties totaling almost \$22 million. Penalties in the order of a million dollars or more have been obtained in 10 matters and six in the last year. This year's matters include:
- Energy Watch for misleading consumers in relation to its energy price comparison service (\$2.015 million), and
- Hewlett Packard for making false or misleading representations to consumers and retailers regarding consumer guarantee rights (\$3 million).
- In 2013–14, the ACCC was involved in 53 proceedings relating to consumer protection enforcement. Strong deterrence messages were sent, securing over \$12 million in penalties and other remedies.

- In 2013, the ACCC received almost 92,000 scam-related contacts with reports of financial losses of around \$89 million. These statistics represent the tip of the iceberg in terms of the prevalence of scams in our community.
- In the second half of the year, the ACCC accepted a court enforceable undertaking from Carlton & United Breweries (CUB) following concerns that it represented that Byron Bay Pale Lager was brewed by a small brewer in Byron Bay. The beer was actually brewed by CUB at its brewery in Warnervale, some 630 km away.
- In December 2013, the High Court allowed an appeal by the ACCC in relation to whether TPG's Unlimited ADSL2+ advertisements adequately disclosed the full cost to consumers of bundled offers. As well as finding the advertisements were misleading, the High Court reinstated the \$2 million penalty ordered by the trial judge, a penalty amount which will deter future breaches.
- In April 2014, Startel Communication Co Pty Ltd was ordered, by consent, to pay \$320,000 for misleading consumers about their rights under the ACL when cold calling consumers (ACCC & AER Report 2013-2014).

The following are some media releases from the ACCC website:

- 10 June 2014 – “Disbury Holdings Pty Ltd, trading as Gotta Getta Group, has paid penalties totalling \$20,400 following the issue of two infringement notices in relation to advertisements for Gotta Getta Group's solar systems. The infringement notices were issued in relation to two advertisements published during 2013. The first advertisement was published on television and radio in South Australia and on the internet, whilst the second advertisement was published on radio in South Australia.”
- 16 June 2014- “The ACCC has accepted a court enforceable undertaking from Barossa Farm Produce Pty Ltd (Barossa Farm Produce) for false or misleading representations and misleading or deceptive conduct in contravention of the Australian Consumer Law (ACL). Barossa Farm Produce has acknowledged that representations made on its product labelling, websites, social media, and at a particular cooking class were likely to have contravened sections 18 and 29(1)(a) of the ACL.”

#### *2.3.1.1 A summary of actions taken by ACCC against misleading practices in the food and beverage industry*

- In 1997, Nestlé Dairy Products provided the ACCC with a court-enforceable undertaking under s. 87B of the Trade Practices Act 1974 (hereafter referred to as the

Act) to address concerns that the sugar content stated in the nutritional panel on two of Nestlé's Vitari range of products could be misleading, because they claimed zero sugar per 100 ml serving.

- In 1997, following court action by the ACCC, the Federal Court granted orders restraining Florida Foods Pty Ltd from making misleading claims about its 'Florida Fresh' and 'Fresh Premium' orange juice. The court found that Florida Foods had breached the Act by supplying goods labelled as 'fresh' when the goods contained reconstituted orange juice and preservatives; 'unsweetened' when the goods contained added sugars; and 'Product of Australia' when the product contained reconstituted orange juice made from imported orange juice concentrate.
- In 2002, following court action undertaken by the ACCC, the Federal Court ruled that Woolworths had published misleading advertisements in breach of the Act in claiming that their beef was fully sourced from local suppliers.
- In 2003, The Outback Juice Company Pty Ltd (OJC) provided the ACCC with a court enforceable undertaking under s. 87B of the Act to the effect that OJC would remedy its conduct relating to misleading claims about its juice products.
- In 2004, the ACCC took court action against Cadbury Schweppes Pty Ltd over pictorial representations it made of real fruit on two Cottees cordial products. The products actually contained flavoured cordial concentrate.
- In 2004, following concerns raised by the ACCC, Baiada Poultry Pty Ltd agreed to relabel its Lilydale Select Free Range chicken products. Previously, labels on trays of Lilydale chicken fillets stated that the chickens were "not genetically modified". However, as the feed given to the chickens may have contained genetically modified soy, the ACCC believed that the 'not genetically modified' claim could be misleading, as it potentially conveyed to consumers that the feed used was GM-free.
- In 2005, Berri Ltd provided a court enforceable undertaking under s. 87B of the Act to the ACCC to correct claims about its 'Fruitful SuperJuice' range including 'Green Zone', Kickstart and Immune juice products. The ACCC had concerns that the compositions of the products were being misrepresented.
- In 2005, Dannon Pty Ltd, the distributor of Ceres fruit juice products in Australia, provided a court enforceable undertaking to the ACCC under s. 87B of the Act to correct claims about the "100 per cent fruit juice" labelling on some of its products. Dannon's undertaking included agreeing that future representations and illustrations on the packaging of the Ceres range of juices would not:

1. create an overall impression that a juice product contained 100 per cent of a particular fruit juice when that was not the case;
  2. represent a fruit juice to be a 100 per cent product when vitamin C had been added.
- In 2006, Just Squeezed Group agreed to provide a court enforceable undertaking under s. 87B of the Act to the ACCC for certain of its products. Just Squeezed Group agreed to stop manufacturing fruit juice under the brand name, 'Just Squeezed Fruit Juice', after the ACCC raised concerns that the labelling misrepresented the contents of its products. Of the juice products made by the Just Squeezed Group, only one contained fresh juice, ranging from 25% to 75%, depending on seasonal factors. The rest of the range contained reconstituted juice. Although the ingredients on the product labels listed reconstituted juice, the prominence of the word 'Just Squeezed' on the labels, together with images of fruit and words such as 'Orange Juice' and 'Apple Juice', created an impression that each product was made directly from the fruit shown on the labels and did not contain reconstituted juice.
  - In 2006, Uncle Tobys provided the ACCC with a court enforceable undertaking under s. 87B of the Act regarding its Roll-Ups products. The ACCC had raised concerns with Uncle Tobys that, by representing that Roll-Ups were "Made with 65% real fruit" or making representations that created an overall impression that Roll-Ups were made by converting fruit into a Roll-Up with minimal processing, this may breach the Act. (Food and beverage industry-Food descriptors-Guideline to the Trade Practices Act, November 2006)
  - In late July 2011, the ACCC accepted court enforceable undertakings from Aldi Foods Pty Ltd and manufacturer of condiments and spreads, Spring Gully Foods Pty Ltd, for making misleading claims on labels about the composition of 'Just Organic' honey.
  - In late August 2011, the ACCC instituted proceedings in the Federal Court against meat retailers Hooker Meats Pty Ltd, trading as Peninsula Bulk Meats and King Island Meatworks & Cellars Pty Ltd, and its director. The ACCC alleged that Hooker Meats misrepresented in newspaper advertisements and on its website that its meat was grown on King Island. The ACCC also alleged that King Island Meatworks & Cellars and its director made similar claims that a significant portion of its meat was grown on King Island (Hartley, 2011).
  - In 2013, a Melbourne-based meat company, Luv-A-Duck, was fined a sum of \$360,000 for a range of misleading claims including that its ducks were "range reared and grain

fed”. The slogans appeared on the company’s packaging, website, brochures, and in a promotion that it ran at the Adelaide Good Food and Wine Show in 2012. The company also claimed its ducks were “grown and grain fed in the spacious Victorian Wimmera Wheatlands”. The ACCC argued that, in reality, the Luv-a-Duck’s ducks had not spent any time outside of a barn.

- Baiada Poultry and Bartter Enterprises were fined a total of \$400,000 for misleading claims stating their chickens had been “free to roam” (Redrup Y 2013).
- Australian consumer watchdog CHOICE recently reviewed 200 products that claim to be “healthy”, uncovering some worrying findings. Results of the study have revealed how food manufacturers and others exploit current trademark law and practice in Australia, in order to mislead consumers into believing that their goods have health or environmental benefits.

Australian trademark legislation does not allow for the registration of trademarks that are likely to be misleading, or which may deceive or cause confusion. However, the ATMO does not analyse the nutritional value of goods in respect of which new trademarks are applied as part of the trademark examination process. Therefore, on the basis of a product’s trade mark, consumers are often misled into believing that goods are healthy or natural or do not harm the environment, when those goods are in fact damaging to both an individual’s health and to the environment (Meadley, 2012).

- GlaxoSmithKline ("GSK"), the manufacturer and supplier of Ribena, the popular blackcurrant fruit drink, was fined NZ\$227,500 and ordered by the Auckland District Court to run a corrective advertising campaign.
- Following the charges brought by the New Zealand Commerce Commission, GlaxoSmithKline Australia Pty Limited ("GSK Australia"), the importer and supplier of Ribena products in Australia, reported their conduct to Australia’s consumer watchdog, the ACCC. GSK Australia informed the ACCC that the vitamin content claims relating to Ribena might have misled consumers. GSK Australia gave several court enforceable undertakings to the ACCC, namely, that:
  1. claims would only be made if they could be substantiated by valid testing; and
  2. claims that suggested that Ribena products contain four times the amount of Vitamin C than comparable orange juice products would no longer be made (Fehrenbach 2008).



There is clear evidence of continuous actions taken by ACCC against errant businesses for misleading conduct.

### ***2.3.2 Consumer Affairs Victoria***

Consumer Affairs Victoria is the Australian Consumer Law (ACL) regulator for Victoria, and works with regulators for other jurisdictions to address important national issues. They have a comprehensive integrated compliance framework to ensure businesses do not breach the laws. They monitor the marketplace and enforce the law when non-compliance is systemic or poses a high risk to the community:

- With regard to misleading conduct relating to product safety, they accepted enforceable undertakings from 12 companies and individuals and took court action against 26 importers and suppliers of non-compliant goods in 2013-2014 (Consumer Affairs Victoria, Annual Report 2013-2014).
- On 17 December 2013, Dimmeys Stores Pty Ltd was ordered to pay a civil pecuniary penalty of \$3 million, while Starite Distributors Pty Ltd and Mr Zappelli were ordered to pay penalties of \$600,000 and \$120,000, respectively. This is one of the largest civil pecuniary penalties ordered under ACL, and was the first time a state or territory regulator had taken ACL action in the Federal Court of Australia. The case concerned breaches of safety regulations for products (Consumer Affairs Victoria, Annual Report 2013-2014).
- In April 2015, Melbourne training company, Keats Enterprises Pty Ltd, was convicted and fined \$165,000 for more than 30 breaches of the Australian Consumer Law (Victoria), including engaging in conduct likely to mislead job seekers and recent accounting graduates into enrolling in its courses (Consumer Affairs Victoria).

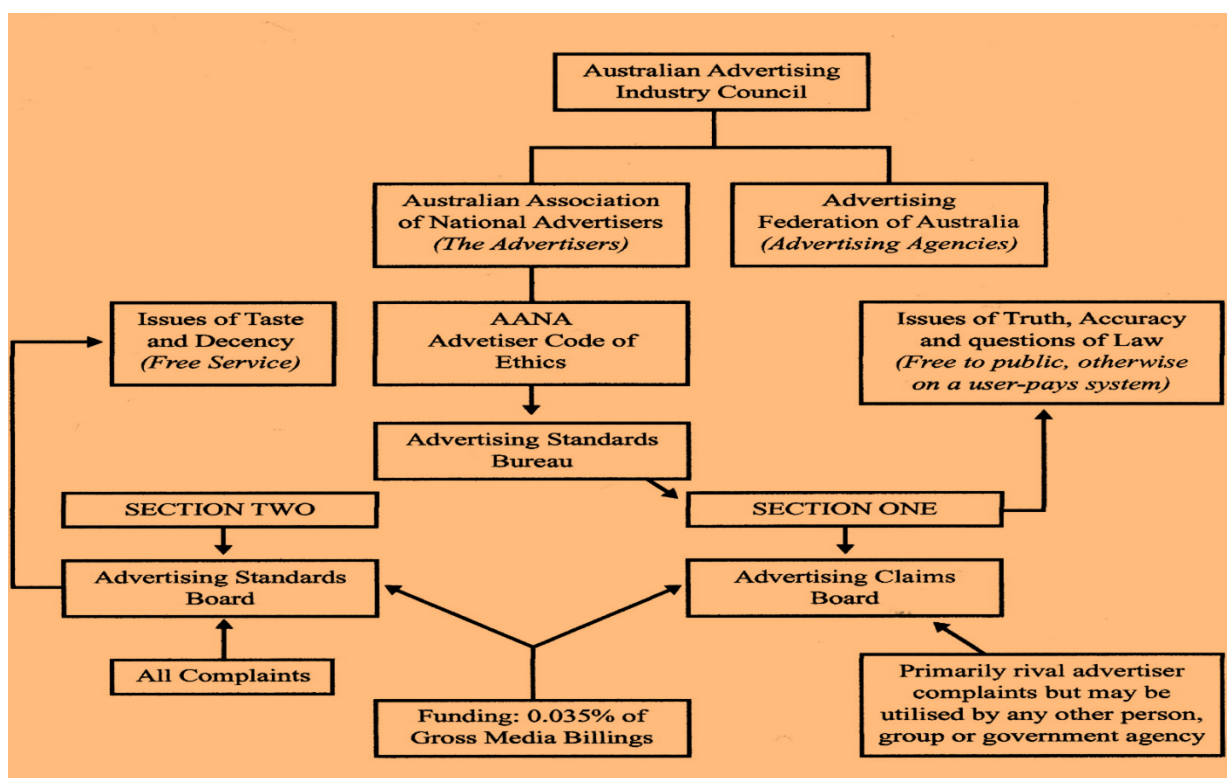
#### ***2.3.2.1 Consumer Affairs Victoria v Hair Science International Pty Ltd (2013)***

In May 2013, Consumer Affairs Victoria (CAV) was successful in its action against Hair Science International Pty Ltd. The company was ordered to pay \$100,000 for engaging in misleading and deceptive conduct. Hair Science International Pty Ltd claimed that it could regrow hair, when clients were actually given a hairpiece. The court declared that Hair Science International Pty Ltd breached the ACL (and the Fair Trading Act 1999, Vic) by engaging in misleading and deceptive conduct or conduct likely to mislead or deceive. As well as the \$100,000 penalty, the court imposed injunctions restraining the company (including its employees and agents) from making false or misleading representations.

Despite the great job the ACCC and Consumer Affairs Victoria is doing to regulate the area, it does hint at the fact that the unsettled state of the law does allow for companies to attempt to slip through the cracks. Probably, this much of litigation and consequence will not be seen if puffery is curtailed strongly like in Turkey (Advertising Law Book 2015, p 735) and in Mexico. (Jimenez et.al, 2013). Mexico's Federal Law for the Protection of the Consumer, Article 32, states that an advertisement must be truthful and verifiable and cannot contain text, dialogue, sounds, images, marks, geographic indicators or other designations that could induce consumers to err or be confused (Trujillo, 2007). Any descriptors that cause error or confusion such as inexact, false, exaggerated, artificial, or tendentious information are illegal.

### 2.3.3 Self-regulation

There is also a self-regulatory system in Australia that governs advertisements, and this is represented in Figure 2.2.



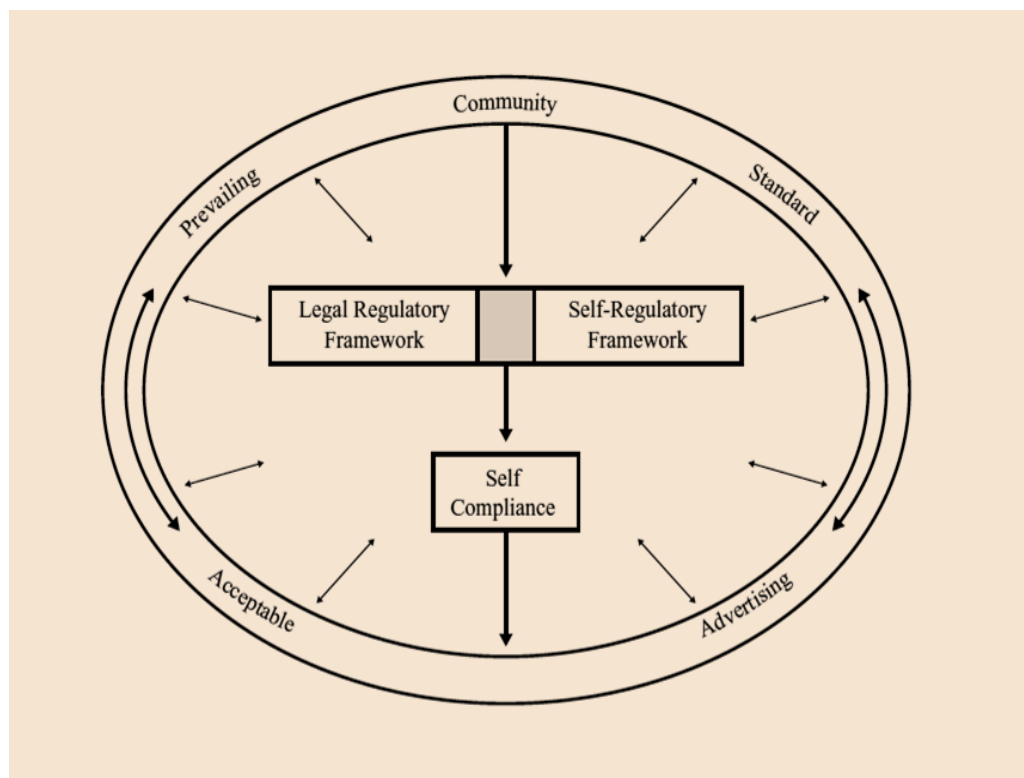
**Figure 2.2 Self-regulatory system used to regulate advertising in Australia.**

Source - Developed from Baker, Graham & Harker (1998)

This system replaced a previous system that failed to meet its expectations. It has been examined to determine whether it manages to serve the needs of consumers in relation to regulating misleading conduct. This is more so in light of online advertisements:

Harker, Harker and Volkov (2001) state that advertising contributes to a country's economy but it also needs to satisfy social norms. They add that advertising should be responsible and accountable

Figure 2.3 illustrates how the self-regulatory system sits in with the legal regulatory framework. The self-regulatory framework handles customers' complaints with the law. The regulatory framework forms the background against which industry codes are drawn. The codes that the ASR (Australian Self-Regulatory system) comes up with will be based on prevailing community standards. The process of self-compliance should then result in acceptable advertising. Both prevailing community standards and acceptable advertising impact on each other, and they provide indications to those involved in formulating the legal and self-regulatory framework.



**Figure 2.3 Advertising Regulation**

Source: Harker (1998)

One key difference is that, rather than being politically accountable to the electorate, the regulator is politically accountable to the government, usually in the form of some sort of oversight obligation. In addition, the regulator will be accountable to the courts within the

framework of administrative law. Finally, the regulator is accountable to the public opinion via the news media (Wiener & Richman, cited in Farber & O'Connell, 2010, p 363).

However, there are some problems associated with the Australian self-regulatory system (ASR) that have been identified (Harker, Harker, & Volkov 2001):

1. ASR programs are established primarily to protect members of the public, but there are a growing number of complaints stemming from competitors and trade organizations that may clog up the system and result in delays. This will mean that there will be lesser chances of actions being brought by members of the public.
2. Public members of a complaint handling body comprise better educated and better known people, and the question is whether they appropriately represent prevailing community standards of a society.
3. The new Advertising Standards Board has been established on a voluntary basis.
4. Many of the other industry organizations have their own codes of conduct.
5. The Advertising Claims Board handles questions of truth, accuracy and questions of law on a user-pays basis. The system is funded by a levy of 0.035% surcharge on gross media billings, which is more than twice the previous levy.
6. Both systems require a complaint to be in writing, and this poses problems for the illiterate, poorly educated and inarticulate members of society.
7. Funding is also voluntary, and thus the regulators are put in the delicate situation of sometimes penalizing the very advertisers that fund their operations.
8. If advertisers are paying for and running the ASR system, the question is, will they be acting in our best interests or their own?



The last two points mentioned above highlight the need for examining the coherency of law as well. Sheehy B and Feaver D (2011) state that the chances of regulatory failure increase when the regulatory objectives and the methods of achieving those objectives are mismatched. Another interesting point brought up by Feaver D and Sheehy B (2011) is that regulators can only effectively resolve problems when the boundaries of the subject matter they are regulating are defined. This may pose a quandary for the regulators, because the law is not entirely settled in this area.

Feaver D and Sheehy B (2011) also goes on to caution that, where the statute is silent, regulators should not try to make decisions in that area. Allowing regulators to make decisions may add to further uncertainties. If the law itself has not ventured in that direction, then

regulators will also refrain from doing it. Thus, one affects the other, and it is essential to examine the two as a composite picture.

Thus, we can see that there are some issues related to self-regulation as well. The information gathered helps to provide some details answering some of the research questions in the present thesis.

Figure 2.4 provides a summary of the actions taken by self-regulatory bodies in Australia and how they relate to the research questions.

| <p><b>Literature<br/>and its<br/>relevance<br/>to the<br/>Thesis</b></p>  | <p><b>Australian Self-Regulation</b></p> <p><b>ACCC</b></p> <ul style="list-style-type: none"> <li>Courts ordered pecuniary penalties in 33 ACL cases totalling almost \$22 million. (ACCC &amp; AER Annual Report 2012-13)</li> <li>ACCC involved in 53 proceedings that secured over \$12 million in penalties and other remedies. (ACCC &amp; AER Annual Report 2013-14)</li> </ul> <p><b>Consumer Affairs Victoria</b></p> <ul style="list-style-type: none"> <li>Enforceable undertaking accepted from 12 companies and individuals. Court actions taken against 26 importers and suppliers of non-compliant goods. (Consumer Affairs Victoria, Annual Report 2013-2014)</li> <li>29 Actions taken against perpetrators from different industries</li> </ul> <p><b>Limitations of Self-Regulatory System</b></p> <ul style="list-style-type: none"> <li>Clogging up of the system</li> <li>No true representation</li> <li>ASB established on non-voluntary basis</li> <li>Various codes</li> <li>ACB operates on user-pays basis</li> <li>Advertisers pay for the running of the system (Harker, Harker, &amp; Volkov 2001)</li> <li>Coherency of regulation issues (Sheehy &amp; Feaver 2011)</li> </ul>  | <p><b>Relevance</b></p> <p>The data gathered help answer the two secondary research questions:</p> <ul style="list-style-type: none"> <li>What is the nature and extent of puffery regulation in online advertisements?</li> <li>Whether the regulation of puffery is effective in the area of online advertisements?</li> </ul> |
|---|--|--|
|---|--|--|

**Figure 2.4 Summary of Australian Self-regulatory measures**

We now move to the next component, Online promotions.

## 2.4 Online Promotions

Online promotions are marketing carried out via advertisements in the Internet domain. These advertisements are viewed by consumers via computers and mobile devices such as phones and tablets. They are linked by the communication system known as the Internet. The advertisements can be viewed at any time and have a higher rate of frequency than ones placed on television and radio. They can take the form of videos that can be found on YouTube. Online promotions are not time-barred, just like online purchasing.

A brief timeline of the evolution of Internet is required at this stage to gain some perspective as to when online promotions became more widely used. The timeline was drawn by Zimmerman and Emspak (2017):

**1961:** Leonard Kleinrock wrote about ARPANET, the predecessor of the Internet. The paper he wrote was titled ‘Information Flow in Large Communication Nets.’

**1965:** Packet switching technology enabled two computers at MIT Lincoln Lab to communicate with one another.

**1973:** The term Internet is born. The University College of London (England) and Royal Radar Establishment (Norway) connect to ARPANET. Global networking becomes a reality.

**1974:** A commercial version of ARPANET, known as Telenet, is introduced, and the first Internet Service Provider (ISP) is born.

**1974:** Vinton Cerf and Bob Kahn (referred to by many as the Fathers of the Internet) publish ‘A Protocol for Packet Network Interconnection’. The design of TCP is detailed in this publication.

**1991:** The World Wide Web is introduced to the public by CERN.

**1998:** The Google search engine is born. This revolutionized the engagement of users with the Internet.

**2004:** The era of social networking begins with the introduction of Facebook.

**2005:** YouTube.com is launched.

The various methods by which online promotions occur will be explained next, before challenges posed by this medium are discussed. The more popular methods are outlined below.

#### ***2.4.1 Search Engine Promotions***

A popular method used by consumers to find products for purchase is by using search engines such as Yahoo, Google and MSN Search on the Web. The search engine is a software procedure that is designed to search for information on the Internet. The results of the search request are commonly shown in a line and are mixed web pages, images and other components. This is referred to as the search engines results page (SERPS). Search engine promotion is done through search engine optimization, the objective being to achieve a higher rank in the search results page. Most of the search engines offer some sort of pay-per-click advertising. (Bui 2009).

#### ***2.4.2 Paid advertising***

Marketers pay high traffic sites or Internet publications to include a graphic or link that will channel large numbers of people to their site. There are several popular forms of paid

advertising, with new approaches cropping up all the time. Banner ads are one example of paid advertising that has been around the longest, but they can be expensive (Bui, 2009).

### ***2.4.3 Social Networks***

Many businesses advertise their business or services on the social networks such as Facebook, MySpace or many more. The social media network used extensively by people all around the globe is a forum used by marketers to reach a larger population of potential purchasers. Facebook offers pay per click advertising on their social network. That is, you pay for every click of traffic that is sent from Facebook to your site. These clicks can be targeted towards certain demographics and age groups to ensure better click through rates and better conversions of your ad on your site. The list of social networks includes Facebook, MySpace, Bebo, Flixster, Friendster, hi5, LinkedIn, and YouTube (Bui, 2009).

### ***2.4.4 Social Network Applications***

This is a form of viral marketing. People purchase applications to make their sites and profiles more attractive. Applications like these draw in a huge user base that return continually to the application page and are then exposed to advertising or additional services (Bui, 2009).

### ***2.4.5 Email Marketing***

Email marketing has become one of the most profitable and economical ways to manage customer relationships. Marketers are presented with many opportunities and benefits with this medium. Its benefits include:

- low cost;
- access to a targeted and qualified audience;
- fast, efficient and effective;
- offers personalized communication;
- easy to track and evaluate;
- increased sales, awareness, and traffic (Wilson, 2000).

### ***2.4.6 Blogging***

Blogging allows businesses to get their content online. It creates a massive wealth of information for people to read and learn about various topics and opinions people have on these topics. Having a blog to promote your main site or content is a fantastic way to build traffic.

Examples of blog sites are Blogger, Blogsome, LiveJournal, Typepad, WordPress, and Xanga (Wilson 2000).

#### ***2.4.7 Viral strategies***

Another method employed by marketers is to design a strategy that encourages others to carry your marketing message via e-mail, using their own network of relationships and preferably their own resources. This is called “viral marketing”. The classic example is HotMail.com, a free e-mail system. Each e-mail message (sent by definition to a person’s own friends and associates) carries a message encouraging the recipient to sign up for a HotMail account. (Wilson 2000). Viral marketing is suitable for websites and small- and medium-sized enterprises (Helm, 2000).

#### ***2.4.8 RSS Feeds***

The use of Real Simple Syndication (RSS) feeds is to push news articles and site updates out to all of the site’s subscribers. RSS delivers news directly to the user’s desktop or newsreader where the users check for updates as they happen. Live and instant updating is now made possible. This technology can be taken even further for republishing on other sites, and even publishing on micro blogs like Twitter. The big advantage here is that marketing content is published all over the Internet (Wilson, 2000).

#### ***2.4.9 Online Chat***

Online chat mechanisms provide a forum where customers can come together and share their experiences with each other and with businesses. This interactive tool allows marketers direct access to customer opinions where they can gauge trends and determine their views on the industry (Bui, 2009).

#### ***2.4.10 SMS Marketing***

This is a very direct way of marketing to clients or customers. It is perhaps the fastest and most direct way to get to all customers, but it can also be very expensive. There are limitations as to how much information can be included in this form (Bui, 2009).

#### ***2.4.11 Consumers and Internet Usage***

The information above tells us that there are many platforms that can be used to reach a consumer and to influence them. Consumer comes across advertisements via searches made on



a search engine, YouTube, and also via email and social media advertising. The frequency of messages helps to imprint the message in the mind even if it is not believed, and this is because of the exaggeration employed. The frequency of messages within a day can be high due to the fact of the many numbers of hours that an average person spends online. The following statistics give us an idea of Internet usage in Australia and the rest of the world:

*Average Number of Hours Spent on the Internet Per Day on Devices*

Australia Average:

Mobile = 1.7

Desktop/Laptop = 4.5

Global Average:

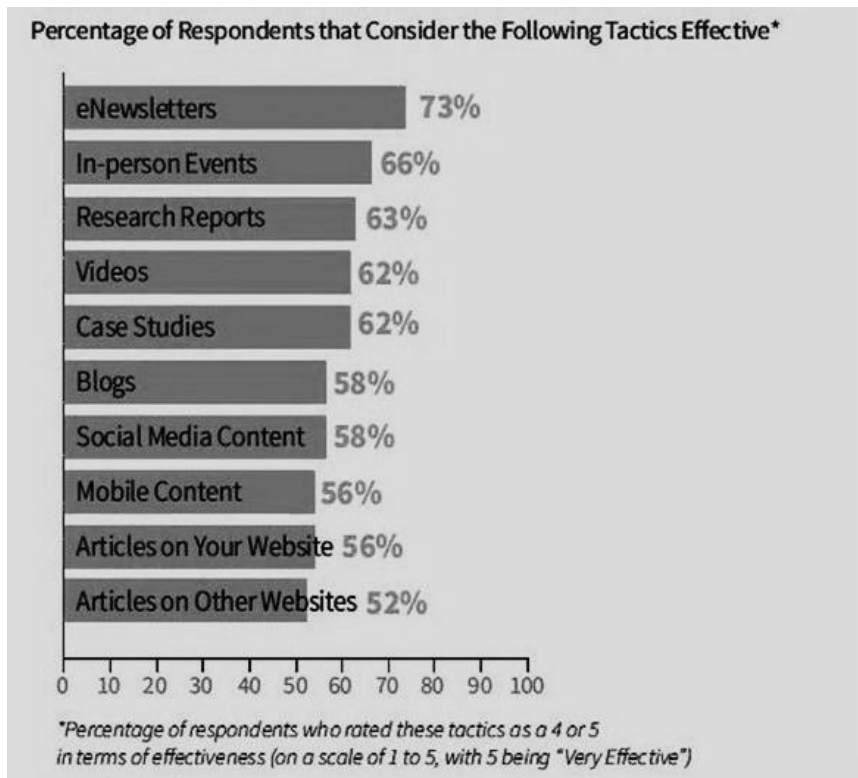
Mobile = 2.1

Desktop/Laptop = 4.8

This shows that there is a good chance that users in Australia can be exposed to advertisements, since average usage is only slightly below the global average. Advertisements are not only found on YouTube but can be found even when e-mail or social media is used. Research by Garcia-Marques and Mackie (2001) on the Propinquity effect shows that message familiarity by repetition was more persuasive than less repeated messages. This would mean repeated puffery messages online can become more persuasive. The next factor we have to be cognizant of is that the target market for online commerce is growing. The relevant figures were mentioned in Chapter One, but are reproduced here to put things in the perspective of online promotions.

Roy Morgan Research states that there was a 12% growth in the online retail sector in 2013 and 50.3% of Australians had shopped online in the months of April to June 2013 (State of the Nation Report 2013). Mean value of monthly purchases by Australians grew by 5.8% from 2011 to 2013 and the number of purchases grew by 46.2%. Three in ten Australians shop online weekly (Ewing 2014). Australians spent a record \$16.6 billion online in the year 2014 to January 2015, up 9% year-on-year according to National Australia Bank's (NAB) latest Online Retail Sales Index.

Figure 2.5 illustrates how many avenues can be used by marketers to reach consumers online; and shows the effectiveness of the online marketing methods as rated by users of these methods.



**Figure 2.5 Effectiveness Ratings of Tactics among Australian Marketers who use them**

Source: Content Marketing in Australia 2014 Benchmarks, Budgets and Trends, Content Marketing Institute/ADMA.

#### ***2.4.12 Challenges faced by consumers***

Having looked at this area from the marketer's side, we now examine some of the possible challenges faced by consumers using the same medium to make their purchases.

The Productivity Commission, in its Review of Australia's consumer policy framework, noted that Australian consumers faced:

- *a more competitive market environment*, and one factor was the growth of the Internet as a mechanism for consumer transactions.
- *the influence of technological change*, which has contributed to greater product choice and changes in spending patterns, but also presented new risks for consumers.
- *greater consumer heterogeneity*, in terms of increased numbers of sophisticated consumers but also a wider range of vulnerable consumers, and higher expectations of goods and services (OECD 2014).

The increasing migration of consumers to the online markets from the brick-and-mortar space brings with it new issues because of the prevalent differences in the mediums. Liu and

Shrum (2002) found that the level of active control, the level of two-way communication, and the level of synchronicity, were greater in an online context. In addition, unlike the Internet, many other forms of media can only be used in a structured way. When reading a newspaper or a magazine, there is little ability for the media to distract or interrupt the consumer.

While social science researchers may debate for some time whether the same words make a different impression in e-commerce than they do in more traditional media, there is certainly evidence that people are more likely to remember what they see than what they hear online (Shapo & Reeg 2001).

The next related factor that needs to be considered is the challenges posed by online transactions.

Smith R (2000) states that the Internet can cause the boundaries between information, advertising and entertainment to be blurred. Consumers may mistake puffs to be facts that are objective and reliable.

The common problems identified by him and others in this area are as follows.

1. Difficulty in proving claims.

Most of the advertising content that appears on the Internet is in the nature of an invitation to treat. An invitation to treat is the stage that occurs before the stage of offer, and it is a request to the other party to make an offer. Advertisers will only be held liable if the objectionable content forms part of the terms of the agreement. Thus, since the puffery in the advertisements are considered pre-contractual, they are deemed not actionable. It can also be difficult to prove what transpired between the parties as there will be evidentiary and forensic issues.

2. Inability to determine authenticity of products because they cannot be examined.

The words, images or descriptions used may not make it easy for the customer to determine whether it is a legitimate advertisement or one that contains misleading content.

3. Difficulty in litigation as parties may be from different parts of the globe.

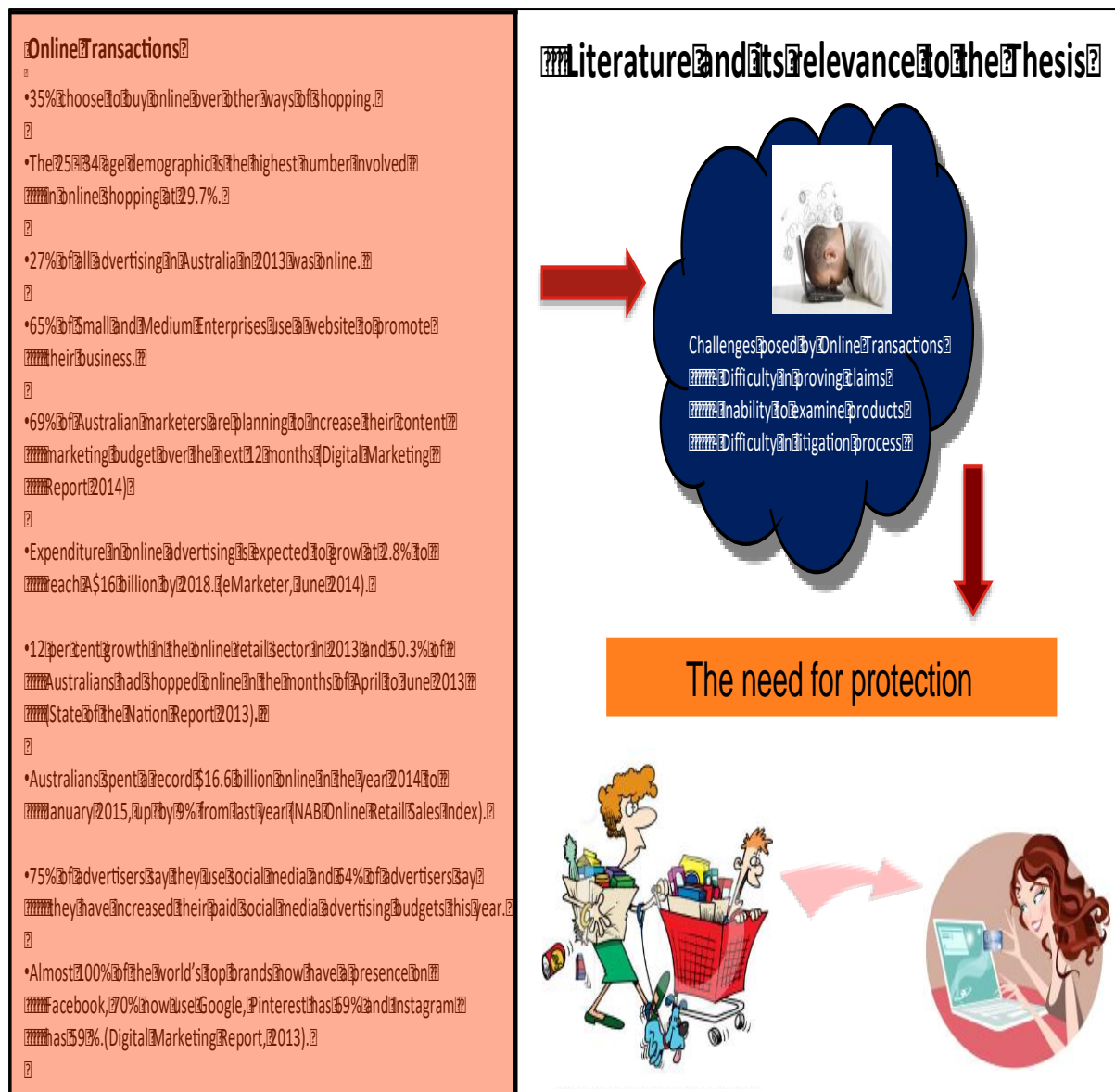
4. Lack of specific legislation relating to online transactions.

We find that legislation in the Electronic Transactions Act 1999 deals with formation of the contract but does not touch upon puffery and misleading practices in online transactions.

5. Sales over the Internet can manage to bypass restrictions placed by authorities that formally control sales in the brick-and mortar world. An example of this would be online pharmacies (Halbert & Ingulli 2005).

Figure 2.6 provides a look at the increasing movement of consumers towards online purchases and the marketers' response to this trend. This raises the issue of need for increased protection for consumers because of the inherent challenges posed by this form of purchasing.

This examination has highlighted the issues that need to be addressed with regard to the effect of online promotions on consumers.



**Figure 2.6 Summary of Online Marketing and its implications**

## 2.5 Theoretical Marketing Underpinnings

Some of the key players in this area include marketers and the advertisers they use for their promotions. Marketing has been described as the ‘way in which an organisation matches its human, financial and physical resources with the wants and needs of customers. The term ‘advertising’, can be defined as all non-personal communication, in a measured media by an identifiable sponsor (Meldrum & Macdonald, 2007).

Since this research is based on marketing via electronic means, an explanation of online marketing and the various methods of trading via the Internet is warranted:

‘Internet marketing, also known as web marketing, online marketing, webvertising, or e-marketing, is referred to as the marketing (generally promotion) of products or services

over the Internet. iMarketing is used as an abbreviated form for Internet Marketing. Internet marketing is considered to be broad in scope because it not only refers to marketing on the Internet, but also includes marketing done via e-mail and wireless media. Digital customer data and electronic customer relationship management (ECRM) systems are also often grouped together under Internet marketing.’ (Priyanka 2012)

Priyanka (2012) provides the following list that describes the different online avenues utilized by marketers.

- **Display advertising**

In this form of advertising, web banners or banner ads are placed on a third-party website. The objective would be to bring awareness of the product and to channel traffic to the company’s website.

- **Search Engine Marketing (SEM)**

Involves the usage of paid placement, contextual advertising, paid inclusion or free search engine optimization techniques to increase visibility of websites in search engine result pages (SERPs).

- **Social Media Marketing**

Social media sites like Facebook are used to draw attention to available products.

- **Email Marketing**

Drawing attention to products using the electronic mail system. Cold lists or current customer database are utilized to send ads, request business or solicit sales.

The different types of email marketing are:

**1) Email Newsletters** - Regular emails are utilized to build the relationship with the customer.

**2) Transactional Emails** -These are triggered based on a customer’s actions with a company and they include dropped basket messages, purchase or order confirmation emails and email receipts. They serve the purpose of conveying information based on the enquiry that triggered it.

**3) Direct emails** - This involves sending out emails solely to communicate a promotional message like a special offer or a catalog of products. This is achieved using a list of

customer or prospect email addresses or renting a list of email addresses from service companies.

- **Referral Marketing**

Awareness of products is increased by word of mouth referrals. Reviews by other customers of the products provide the impetus for purchase decisions.

- **Affiliate Marketing**

Consumers are brought to a business's website by the marketing efforts of an affiliate. Payments are normally made for this service.

- **Content Marketing**

Informative content is created and shared freely with the objective of converting prospective customers into actual customers and existing customers into repeat customers.

Having looked at the various methods of online marketing that are used, it is also important to understand how marketers identify their target market. This involves an examination of the social, psychological and cultural factors that influence purchase decisions. Market segmentation is practice of dividing a market into meaningful groups. The marketers then determine which groups will be the best potential target market. The four basis methods for segmenting consumer markets are:

- i) Demographic segmentation - based on quantifiable variables such as age, gender, educational level, occupation, income, family size and race/ethnicity.
- ii) Geographic segmentation - based on geographic location. The market may be segmented according to neighbourhoods, cities, states, regions or countries and can also include variables such as climate and population density (urban or rural).
- iii) Psychographic segmentation - based on lifestyle, social class and personality characteristics.
- iv) Behavioural segmentation groups - based on product usage patterns and commitment levels. Product usage patterns include the occasions for purchasing the product and product usage rate (light, medium and heavy users of the product). Commitment levels measure how loyal a consumer is to the product. Buyers may be hard-core loyalists (those who buy one brand all the time), split loyalists (regular buyers of two or three brands),

shifting loyalists (those who occasionally shift from one brand to another) or switchers (those with no loyalty to any brand) (NetMBA, 2002).

Advertisers use a combination of these methods to identify a target market. With online purchasing, the target market is segmented in similar ways and a common platform (internet) is used as a marketplace. Promotion is the key link between the marketer and the consumer in a marketplace where the goods can only be identified by the advertisement. Sufficient exposure to promotional messages is a key factor and the pull factor of an advertisement becomes a crucial tool in closing the deal. This is where puffery comes in and can be used to enhance the attractiveness of a product.

It is important at this stage to examine and understand the marketer's approach to puffery. The question that needs to be asked is that if puffery is mere exaggeration and does not influence consumer behaviour, why do marketers spend money putting it out in the first place? The answer could be couched in the fact that it is a creative way of promoting a product and perhaps done with the understanding that the puffery will not be believed. Alternatively, it could be the license given to do it by the law that prompts its usage. The motives with which they carry out their business objectives will help shed some light on this matter.

Kotler (2007) states that a second view of the marketer's goal is to produce more profits for company shareholders in any legally sanctioned way. He observes that company cynics say that companies should not hire high-minded socially conscious persons as they will not be effective in marketing. An interesting observation especially when viewed in light of the ever-competitive world of marketing where marketers are always aiming for a bigger market share.

Kotler (2007) also states that after examining what constitutes ethical behaviour we find that ethical egoism states that your only obligation is to take care of yourself. If we look at his comment on government requirements, he observes that the law represents the minimum moral standards of a society.

Chonko (1995) argues that the continued use of puffery in mass media proves that advertisers deem it effective in obtaining reliance and altering purchase decisions of a substantial portion of the public.

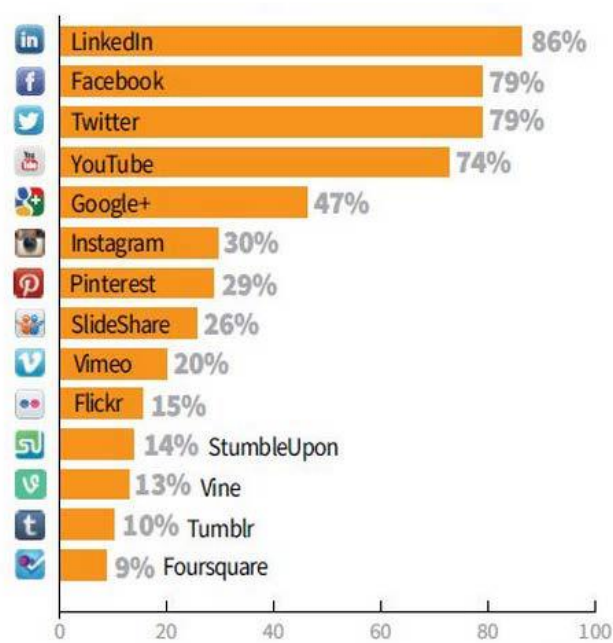
Violations of ethical ideals of society are common in businesses but they are not necessarily violations of business principles (Carr, cited in Gini, Alexei & Marcoux 2009). They argue that as long as a company does not transgress the rules of the games set by the law, it has the legal right to shape its strategy without reference to anything but its profits. This



would mean that an occasional lie may well be justified in the game's ethics and warranted in terms of economic necessity.

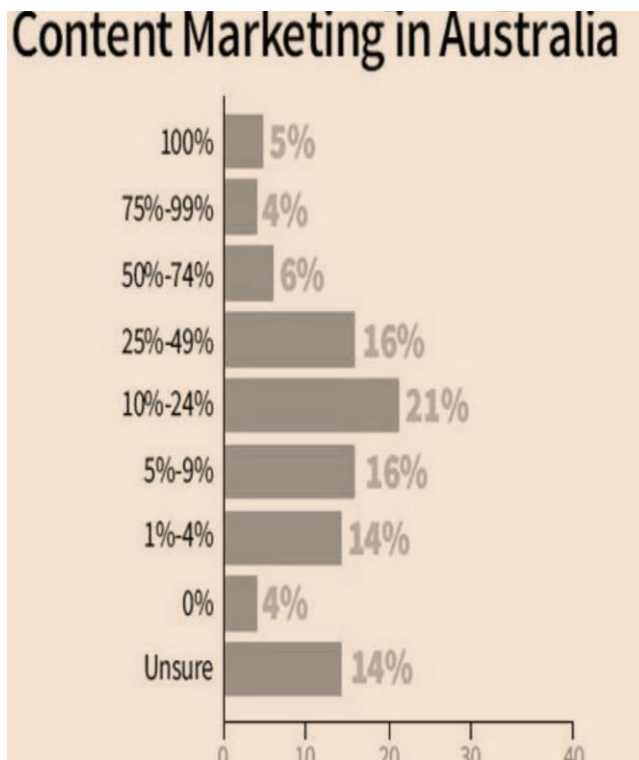
Some argue that in the long run the market will punish the dishonest business. People will eventually discover its tactics and fewer people will buy from it. The victims of the dishonest business will however suffer until this happens. The fact that at some point the unscrupulous business may be forced out of the marketplace is not really adequate protection for the consumer. Most people admit that some regulations are necessary to keep businesses operating within acceptable limits (Econedlink, 2013).

Having looked at considerations taken by marketers, let us now examine some facts and figures about the usage of Internet and social media sites by marketers. The internet is an important business asset for achieving competitive advantages. It is a cost-efficient, productive and effective marketing platform. (Kiang et al. cited in Mohammed & Mohammed 2012). Internet aids marketers to understand and fulfill consumer needs. (Constantinides, cited in Mohammed & Mohammed 2012). A substantial proportion of a company's marketing budget is reserved for online marketing. (Ngai, cited in Mohammed & Mohammed 2012). The following illustrations will show the increasing use of the online medium by marketers to market their products in Australia.



**Figure 2.7 Social Media usage for marketing**

Source: Content Marketing in Australia 2014 Benchmarks, Budgets and Trends: Content Marketing Institute/ADMA



**Figure 2.8 Online usage for content marketing**

Source: Digital Marketing Report 2014, Margin Media



**Figure 2.9 Percentage of Businesses and social media presence**

Source: Digital Marketing Report 2014, Margin Me

| Businesses With       | 2010-2011 | 2011-2012     | 2012-2013     |
|-----------------------|-----------|---------------|---------------|
| Internet Access       | 91.2%     | 91.9% (+0.7%) | 92.6% (0.7%)  |
| Web Presence          | 43.1%     | 44.6% (+1.3%) | 47.2% (+2.6%) |
| Social Media Presence | -         | 18.1%         | 26.1% (+8%)   |

**Figure 2.10 Internet and Australian Businesses**

Source: Summary of IT use and Innovation in Australian Business, 2012 -13, Australian Bureau of Statistics

Other notable figures are that 27% of all advertising in Australia in 2013 was online. 65% of Small and Medium Enterprises use a website to promote their business. Mobile marketing ad spend grew more than 100% in 2013 (Digital Australia 2014). 48% of small and medium businesses and 79% of large business had a social media presence in 2015-2016. 23% of small businesses, 57% of medium-sized businesses and 38% of large-sized businesses had allocated 10% of their marketing budget to social media (Sensis Social Media Report 2016, p 66). Expenditure in online advertising is expected to grow at 2.8% to reach A\$16 billion by 2018 (eMarketer, June 2014).

Australian businesses argue that they are competing against more established and more competitive global players with structural advantage. The proliferation of digital economy has propelled every Australian business with an online presence into the global marketplace. It is a significant opportunity for an organization to advance their online offering or risk losing their market share to competitors both local and overseas (Digital Australia 2014).

The gradual increases reflected by the illustrations above indicate that the Internet will slowly become the main focus of marketers to market their products as time progresses. Mobile marketing has exploded; it has grown exponentially and will very soon be the main focus of marketing. With millions of smart phones, tablets and other portable devices that are internet-capable, mobile marketing is a sector that businesses cannot ignore.

Marketers have a duty to find ways to market their product in the most effective way. The freedom they have been given with regards to this, allows them much scope to achieve that aim. Increased regulation will place restrictions on that freedom and thus will not be received warmly. What needs to be examined is whether there can be a new common ground identified where there can be increased protection for the consumer as well as more defined

boundaries for marketers. This will benefit marketers as they can save themselves litigation costs that result from breaches of the law.

The last component that was looked at is the Consumer and details are provided from the next page onwards. The Consumer is important because it is the consumer that bears the brunt of puffery usage.

## **2.6 The Consumer**

The examination of the Consumer starts at the point of whether a consumer is expected to recognise puffery. A huge part of the protections afforded to puffery rests upon the fact that the customer is expected to know that the advertisement is not misleading. The concept of Caveat Emptor (let the buyer beware) is used to support this proposition. This concept states that a consumer is expected to make reasonable enquiries about products before purchasing them or is expected to detect falsities based on his/her level of knowledge and understanding. A more detailed summary about the gradual fading away of the importance of this concept was seen in section 1.3.3 of Chapter 1. The level of knowledge expected of a consumer as per the law has to be discovered.

The question that needs to be asked now is whether the tests being employed by the courts are satisfactory and standardized and whether these tests will be sufficient enough to protect the consumer in online transactions. Kapnoullas & Clarke (2008) comment that the standard of care that consumers need to employ when assessing mass advertising or marketing claims is unresolved.

“It is generally accepted that children do not always have the experience to identify exaggerations and untruths. Other groups that may need extra protection are the elderly, those with limited language skills...” (Econedlink 2013). Those with limited experience in making purchases over the Internet can be added to the list above. The advent of Internet sales also puts a heavy burden on the buyer to ascertain the extent of puffery. It is obvious that not all categories of people will have the necessary knowledge to assume that an advertisement with puffed up claims are exaggerations:

“It would be interesting to know what effect puffed claims have on a consumer's memory for an experience, particularly since policymakers categorize puffery as blatantly misleading, but consumers do not.” (Cowley 2006).

Another fact that becomes quite relevant is the fact that Australia, like many countries in the world today consists of a large population of immigrants. Advertisers need to pay close attention to the dominant culture and its impact on consumption behaviour, without readily dismissing potentially different reactions from new immigrant communities. (Jimenez. et al 2013).

The consumer is not expected to know too much about products and the test employed by Section 18 ACL seems to make it not too difficult to establish that a consumer is likely to be misled by a potentially misleading ad. The only problem with this is that if misleading conduct is in the form of puffery, then this seemingly easy test to fulfil is no longer of any help to the consumer. The difficulty now lies in proving that it was not really a puffery. The other difficulty is getting remedies for online transactions. This weighs heavily upon the consumer when making a decision as to whether to purchase. This thus puts a heavy burden on the consumer to be well-versed and to have adequately researched the product prior to making a purchase. The process of purchasing is not always easy with distractions caused by pop-ups and overload of information that may not always be reliable. The added disadvantage of unequal bargaining strengths of parties also weighs heavily upon them. Thus the consumer is not always in the best position when making a purchase.

The relationship between the marketer and the consumer is a close one and in this symbiotic relationship, the marketer uses many methods to predict and guide consumers in their decisions they make. Sutherland (2009) makes the following observations. When faced with decisions with regards to purchases involving lower priced products, the consumer finds that there are many different brands available to choose from. When the choice is hard to make, advertising is used to raise awareness of the positive perspectives. There are higher chances that confirmatory evidence will be noticed by the consumer and favored. It is focusing of attention on one perspective rather than another.

The small differences advertising can make may in time add up to significant effects. Small increments are just below the Just Noticeable Difference (JND). By merely registering a claim in our minds, it does not necessarily mean that we believe it, but it does make us aware that there are claimed differences between the brands. Advertising creates marginal differences that can build into larger differences. Image advertising produces gradual shifts in our perceptions with regard to a particular attribute of a product. For example, safety is one attributed that has become synonymous with Volvo cars because of the advertising that has focused on that attribute. We associate that brand in our mind with that attribute more than we

associate it with any other competitive brand. User Image Advertising is used to change our perception as to the typical user-stereotype or the situation in which the brand is usually used (Sutherland 2009)

Our familiarity with a claim is increased by repetition. If a claim is repeated and not challenged, our minds begin to think that there may be some truth in the claim, even if not to its full extent (Sutherland 2009)

Other than advertising, the other influences are word-of-mouth, previous experience and expert recommendations. Advertising helps put the particular brand on our short list from which we make the decision. In this case, which alternative gets weighed up is the focus. Even if we like something, if it is not high up in our short list or mental agenda, it may miss the opportunity of being considered. We think more about people and things that are important to us. This prominence in thoughts is called salience. One of the objectives for advertisers is to make their brands more salient for us. One way advertisers try to do this is through repetition. For example, a jingle associated with a product can increase its probability of being in our conscious mind at any moment (Sutherland 2009)

Sutherland (2009) further states that another way advertising can influence us is through 'cueing'. Intentions and the immediate environment form cues for the human mind. One type of advertising focuses on tying a brand to such cues. When our mind is cued to a particular product category, the foremost members of that category come to our mind almost immediately. Frequent advertising and signs catching the attention of consumers in stores are needed to prevent competitors from trying to upset consumers mental agendas by persuading them to consider them instead at the point of sale. In 85% of purchases, only the chosen brand is handled and on average people take no more than 12 seconds in brand selection. Consumers also tend to first notice brands they are familiar with

From the information above, we can gather that marketers have a definite hand in influencing consumers' choices in ways that consumers may not realize. The mind is guided to make a particular decision without being aware that it is being channeled to make that decision.

Furthermore, what influences us will depend on what we already know and are sure of. The veracity of a claim will not appear as an exaggeration if we do not have sound knowledge of capabilities of products and its extent of performance. The rapid rate of technological advancements makes products do more than ever imagined before and at a quicker rate. One who does not keep up with these advancements can end up being unsure of the truth of claims

made. Exaggerations made may be believed to be true or alternatively truths stated may be disbelieved. The uncertainty these rapid changes can create can make the determination of the truth of a claim a much more difficult task.

Hoek and Gendall (2007) in their article titled, 'An Examination of Puffery's Effects on Consumers', draw attention to the fact that Preston (1996) suggested that puffery not only encouraged traders to use non-verifiable factual claims but also provided them with a defence in the event of a challenge of it. They also noted that Preston (1996) found that consumers may not necessarily dismiss puffery claims and questioned whether consumers were really being protected by the regulators' laissez faire approach to puffery. Hoek and Gendall (2007) stated that the availability of evidence that a puffery claim may enhance a brand's attractiveness enough to overcome price differences suggests that puffery is more powerful than regulators have concluded it to be.

One factor that would be relevant in making some conclusions about knowledge levels and expectancy considerations would be the educational levels of people in Australia. On 27 November 2015, a media release stated that Australians are now more educated than ever before (Australian Bureau of Statistics 2015).

The proportion of working aged women (15-64 years) with a degree qualification has increased from around 7% in 1990 to the 29% in 2015. The proportion of men in the same age bracket was 10% in 1990 but now stands at 24%. In the last 25 years, the proportion of women in the same age bracket, with a qualification has risen from 34% to 60% while the proportion of men with a qualification has increased from 45% to 61%.

The following statistics gathered in May 2015 (Australian Bureau of Statistics) tell us about highest educational attainment attained by people aged between 15 to 74 years in Australia:

- Year 11 or below – 26%
- Year 12 or equivalent -18%
- Certificate III or IV -18%
- Bachelor degree -17%
- Graduate diploma or Graduate certificate – 3%
- Postgraduate degree – 5.6%
- 39% of people in the ACT had a Bachelor degree or above as their highest level of educational attainment, the highest proportion of all states and territories.

This increase in education standards and qualifications may point to the fact that it is harder for people to be fooled by an advertisement containing puffery. However, the effect that puffery has is not to make them believe the claims but more so to give product information and make that enter the mind so that it becomes one of the options considered before a purchase is made. The consumer will most probably not believe the exaggeration but the more exaggerated the claim is, the more it sticks in our mind. This brings into question the points forward by Elizabeth Cowley (2006). She states that Renee Descartes, a famous philosopher, propounded the theory that a person does not take in information that he/she does not believe to be true and thus it does not influence them in a future decision they are to make. Baruch Spinoza, another great philosopher, however postulated that the information is taken in, weighed up and then only the choice is made as to whether it is to be believed or not. In this process, that information which may be believed to be untrue is nonetheless already present in the mind of the person and therefore has a chance of influencing them in future decisions. Regulators of law, she adds, favour Descartes theory and therefore give puffery its status of untouchability by the law because they figure the puffery would have had no impact on the mind of the purchaser and therefore there is no need to have a law to protect them when it happens. Cowley comments, that in reality, Spinoza's view is more accurate and therefore there is need for regulation of puffery. This view is shared by Sutherland (2009).

We now look at consumer behaviour when purchasing online. The following statistics explain the purchasing process and consumer behaviour in the online domain (Margin Media 2015). 93% of online research starts with a search engine and 68% of consumers check out companies on social networking sites before buying. One-third of all online activity is spent watching videos. Videos increase people's understanding of your product or service by 74%.

75% of users visit the Marketer's website after viewing a video. 80% of Internet users remember the video ads they watch online. 26% of Internet users look for more information after viewing a video ad. 35% choose to buy online over other ways of shopping. 81% of the Australian population are online and this is 7<sup>th</sup> highest Internet penetration in the world. Having a confident grasp on social media and a relevant presence is extremely important for businesses in this day and age, with many consumers researching a brand or company online long before dealing with them. The younger generations (20-30-year-olds) will do this roughly twice as much as 30-40-year-olds and almost four times as much as 50-60+ year-olds. The 25-34 age demographic is the highest at 29.7%, a group that businesses should target.



In 2015, Deloitte conducted a survey with 2,001 random Australian consumers. The objective was to gather data about online research conducted before making in-store purchases. Australian shoppers were found to be some of the most digitally influenced in the world. 65% of those interviewed researched online before going shopping. 26% did research during their shop and 9% afterwards. Those who were influenced by social media were 25% more likely to make a purchase. 40% of visits to brick-and-mortar stores are digitally influenced. This puts Australia third in the world behind US and Canada. 72% of shoppers arrive at a shop already knowing the goods they want to purchase after researching online while only 28% were influenced by traditional advertising. 49% read reviews, 46% discussed their prospective purchases with family and friends and only 18% discussed it with shop assistants. On average, 21% felt they spend more in-store as a result of online research and this figure increased to 34% in the 18-24 ages bracket (Deloitte 2015).

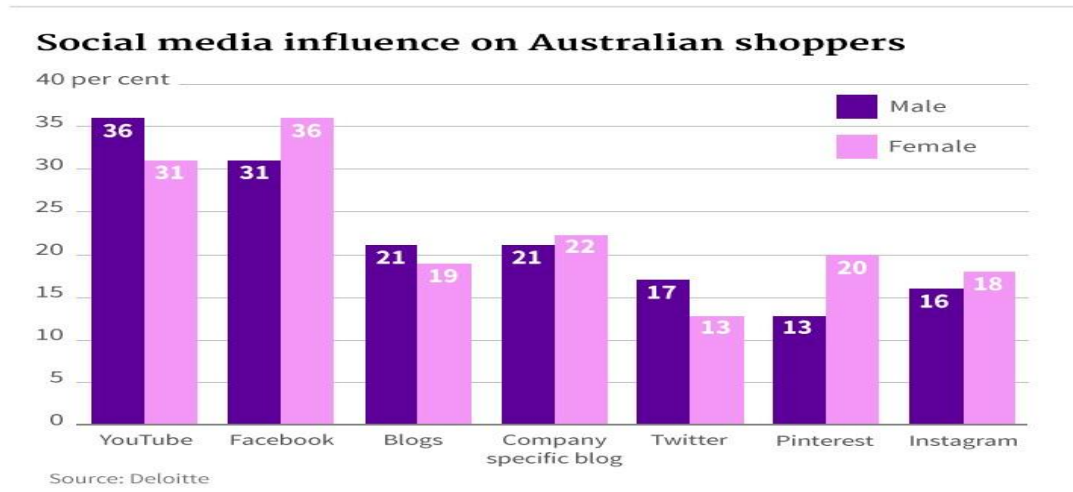
The survey showed that 36% of men were influenced by YouTube, 31% by Facebook, 21% by blogs, 21% by company-specific blogs and 17% by Twitter. The survey showed that with females, 31% were influenced by YouTube, 36% by Facebook, 22% by company-specific blogs, 20% by Pinterest and 18% by Instagram (Hatch, P 2015). The influence of social media on gender can be seen in Figure 2.11.

According to Sensis, an Australian based marketing firm, 20% of consumers used social media to research their purchases and 58% reported that their research resulted in a purchase (Mehra, G (2016)

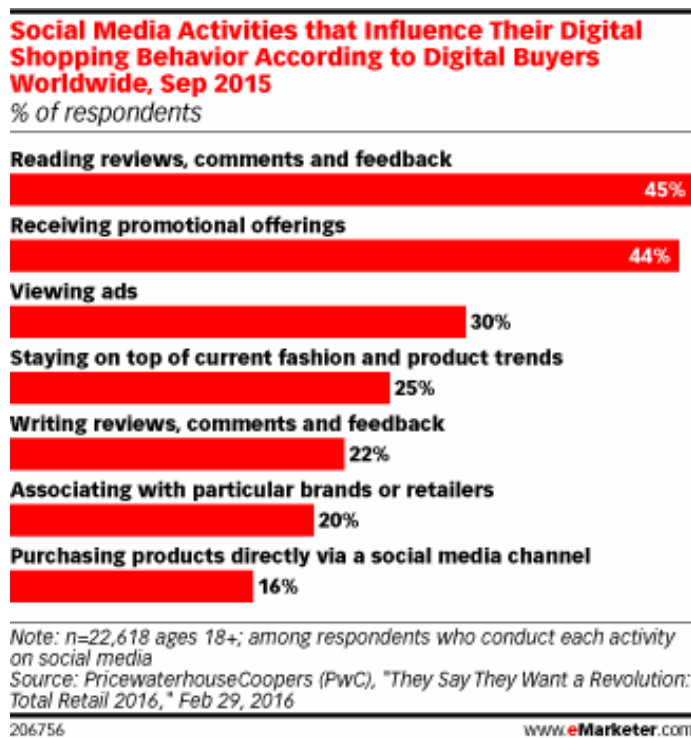
In 2015, PricewaterhouseCoopers polled 22618 digital buyers worldwide aged 18 years and older. 45% said that reading reviews, comments and feedback on social media influenced their digital shopping behaviour. 44% said that their shopping behaviour was influenced by receiving promotional offerings (eMarketer, 2016).

There is now better clarity in terms of the position of the consumer and what they are faced with. This discussion also provided expected knowledge of the consumer when faced with puffery.

A summary of the salient points gathered from all the six components is provided.



**Figure 2.11: Social media influence on Australian shoppers**



**Figure 2.12: Influence of social media activities on digital shopping behavior**

### 2.6.1 Puffery

Existing research on puffery reveal that it does an influential effect that can mislead consumers. The effect of puffery may be caused both by verbal and visual means. The rationale adopted by regulators as to why puffery is not believable has also examined and opposing arguments were considered. The boundaries within which it operates were also looked at.

### ***2.6.2 Legal Framework***

The literature review showed that there was a possible lacuna in the law that may need to be filled. The Law that regulates Commerce also regulates E-Commerce. The ACL placed puffery in a pre-contractual position. The Electronic Transactions Act 1999 is mainly focused on when a contract has come into existence. There was specific mention of when puffery would cross over the line into misleading practice. Case laws are left to determine the boundaries. The comparison of advertising regulation for 23 other countries around the world also showed that many of these countries already have regulation that is more far-reaching than Australia with regard to puffery usage in advertisements.

### ***2.6.3 Regulatory Bodies***

The extent to which the Australian Consumer Law, Electronic Transactions Act 1999 and case law are effective in curbing misleading practices is evidenced by statistics provided of actions taken in court and proceedings initiated by the Australian Competition and Consumer Council. The effectiveness of these self –regulatory bodies in providing remedies and the frequency which remedies were sought by consumers provide indications as to whether regulations could be tightened to make it more proactive rather than being reactive. The efficiency of self – regulatory bodies provided important data as to whether consumers’ rights were being ensured.

### ***2.6.4 Online Promotions***

The literature reviewed pointed to the fact that the shifting nature of promotions and purchases have found their home in the online sphere. The increasingly used online platform does have its pitfalls and leaves the consumer in a disadvantageous position in terms of security and verification of authenticity of promotions. This is balanced by convenience, cost-savings and variety. However, the very nature of its operation does bring in implications from the differing laws of different countries relating to the transaction and does have tendency of putting remedies just a little further away. Tighter and more streamlined regulation with other countries is a desirable alternative.

### ***2.6.5 Theoretical Marketing Underpinnings***

The review of the literature revealed that the motivations of marketers and the principles by which they make their marketing decisions are dependent on many factors but that profit undoubtedly plays a large part in these. The safety net provided by the law for puffery usage makes it an appealing choice. The increased and increasing budgets being spent on marketing

via the internet provides evidence that the platform is profitable. The emergence of social networks and the increasing online platforms available to carry promotions make the decisions to migrate part of business budgets to this platform an easy one. The continued usage of puffery and the billions of dollars spent on employing it in their advertisements is strong evidence that it works and is a strong influential factor. The boundaries thus need to be clearly drawn to prevent abuse.

#### ***2.6.6 The Consumer***

The consumer bears the brunt of puffery exposure and there are a number of factors that make the determination of truth in claims made difficult. The level of knowledge expected of the consumer by the marketer is not necessarily the same as the level of knowledge actually possessed by the consumer. The involvement of consumers in online purchasing and the difficulties encountered were also discovered in the literature review. Promotional methods employed by marketers that could mislead consumers without even resorting to puffery were looked at. The subtle effect that puffery can have on the mind of the consumer showed the long-term effect of puffery usage on consumers. The literature looked at also probed how purchase decisions were made by consumers and how they could be manipulated by marketers. This review showed that consumers were in need of added protection especially in light of E-Commerce.

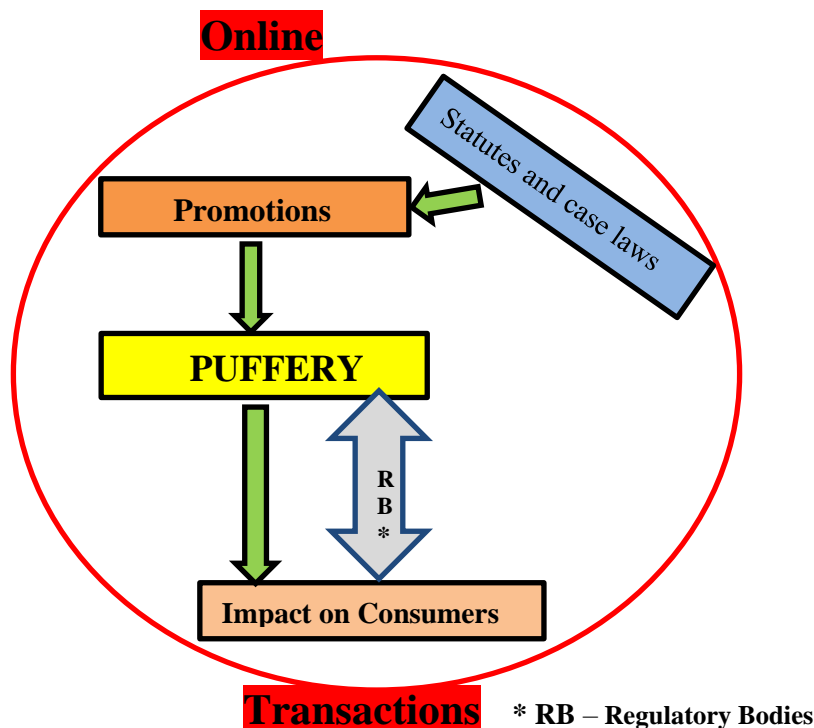
The secondary data collection via the literature review helps answer the primary research question of the present research:

***Is the current regulation of puffery in online advertisements adequate?***

### **2.7 Conceptual Framework**

The Conceptual Framework was then drawn up to set the whole research process in perspective. The execution of the research is based on Figure 2.13.

Figure 2.13 illustrates the concept on which the present as a whole research was based. The framework was drawn with due consideration given to all the dynamic factors that interacted with one another and had an impact on the overall area. Based on Figure 2.13, it can be observed that the focus of the research is on puffery in online transactions and the red circle represents that area. Thus, all factors considered were looked at in light of their effect in the online space. The dynamic factors considered were as follows.



**Figure 2.13 Conceptual Framework**

Statutes and case laws have an effect on the promotions that are carried out by marketers and advertisers and thus they had to be considered. The Australian Consumer Law, Common Law and other legislation that deals with misleading practices in Australia have a direct influence on puffery and its status. The successful usage of puffery as a defence for misleading conduct litigation had to be examined to determine its position. All this had to do with recognition that the status of the law impacted on marketers and consumers alike.

The marketers and advertisers work within the boundaries set by the law in relation to usage of puffery in their advertisements. The motivation behind puffery usage and the freedom to use it by law has a direct bearing on its continued presence in advertisements. Thus this factor sits under the broad categorization of promotions.

Marketers usage of puffery in their promotional endeavours impacts upon consumers. The motivations behind their actions and the position of the law with regard to their promotions thus had to be examined.

The RB in Figure 2.13 refers to the regulatory bodies involved in regulating advertisements. This includes the self-regulatory system used in Advertising and also the Australian Competition and Consumer Commission. These regulatory bodies help to ensure

that advertising by companies sit within prescribed parameters. They act as the filtering agents to prevent undue impacts on consumers by promotions.

The consumer driven focus of this research stands as the central part for this research as the impact of all factors in this research are examined in light of it. Consumers' decisions, knowledge, experience had to be tested to draw conclusions. This represents one of the most important areas area of examination in this thesis.

The Conceptual Framework provides a basis for all research methods to be employed. The next step from here was developing the propositions for this research.

## **2.8. Proposition Development**

The research questions formulated provided the necessary structure to the Literature review. Information sourced according to these defined parameters contributed to the proposition development. These propositions form the basis on which the hypotheses were developed. The hypotheses were then tested and conclusions were drawn after employing qualitative and quantitative methods of research. Detailed discussions on this can be found in Chapters 4, 5 and 6.

A summary of the literature reviewed in order to answer all research questions can be seen in Table 2.3.

The primary research question for this research is:

***Is the current regulation of puffery in online advertisements adequate?***

### Proposition developed from primary research question

The proposition that was developed was that there is ambiguity as to the extent of regulation. The line between misleading conduct and puffery was not clear and had to be decided on a case by case basis. Puffery is used as a defence to mask misleading conduct.

The first secondary research question is:

**What is the nature and extent of puffery regulation in online advertisements?**

### Propositions developed from the first secondary research question

Two propositions were drawn from the literature reviewed. The first is that laws in place assume a reactive role rather than a pre-emptive one. Tighter laws could turn the tide in this matter. The second proposition is that consumers lack knowledge of what is puffery. The

distinction between puffery and misleading practice is not necessarily apparent to consumers. Since puffery is not actionable, consumers can thus be misled.

The second secondary research question is:

***How effective is the regulation of puffery in online advertisements?***

#### Propositions developed from the second secondary research question

The first of the two propositions drawn from the literature review is that there is a positive relationship between consumers' dissatisfaction and their avenues for remedies.

The Second proposition is that legal uncertainty has led to exploitation.

Table 2.3 provides a summary of the Research questions, Literature reviewed and the Propositions that were developed from it.

**Table 2.3 Proposition Development**

| <b>Research Questions</b>  | <b>Summary of Literature Reviewed</b>  | <b>Propositions</b>                                    |
|--|--|--|
| 1. Is the current regulation of puffery in online advertisements adequate? | <p>Policy objectives of the Competition and Consumer Act 2010 -An Australian Consumer Law -Fair markets — Confident consumers (2009).<br/>Sections 18 and 29 Australian Consumer Law – Guide to Provisions (2010).</p> <p>The Australian Broadcasting Corporation Act 1983, Therapeutic Goods Code, the Alcoholic Beverages Advertising Code, Weight Management Industry Code, Advertising Code and administrative boards (Kerr &amp; Moran (2002)</p> <p>Taco Company of Australia Inc. v Taco Bell Pty Ltd (1982) 42 ALR 177,<br/>Parkdale Custom Built Furniture Pty Ltd v Puxu Ltd (1982) 149 CLR 191,<br/>General Newspaper Pty Ltd vs. Telstra Corporation (1993) ATPR41-274),<br/>Campomar Sociedad, Limitada v Nike International Ltd (2000) 202 CLR 45,<br/>ACCC v Target Australia Pty Ltd [2001] FCA 13261<br/>Gillette Australia Pty Ltd v Energizer Australia Pty Ltd (2002) 193 ALR 629<br/>ACCC v Cadbury Schweppes Pty Ltd (2004) ATPR 42-001<br/>Bembridge v Just Spectacles Pty Ltd [2006] WASC 18<br/>eBay International AG v Creative Festival Entertainment Pty Ltd (2006) FCA 1768<br/>ACCC V Telstra Corporation (2007) FCA 1904.<br/>Alami v Langov &amp; Ors [2008] NSWSC 812</p> | P1 -There is ambiguity as to the extent of regulation. |

|  |   |  |
|--|---|--|
|  | <p>ACCC v Global One Mobile Entertainment Ltd (2011) FCA 393</p> <p>ACCC v C I &amp; Co Pty Ltd (2010) FCA 1511</p> <p>ACCC v Singtel Optus Pty Ltd (No 4) (2011) FCA 761</p> <p>Swisse Vitamins Pty Ltd v The Complaints Resolution Panel (2012) FCA 536</p> <p>Historical beginnings of Puffery -Browne M, Hale K &amp; Cosgrove M (2012)</p> <p>Trade Practices Act 1974 and Electronic transactions -</p>   |  |
| 2. What is the nature and extent of puffery regulation in online advertisements? | <p>Enforcement actions taken by ACCC -ACCC &amp; AER annual report 2012-13 and ACCC &amp; AER annual report 2013-14</p> <p>Enforcement action taken by ACCC taken against Baiada Poultry and Bartter Enterprises (Redrup (2013)</p> <p>Trademarks that can mislead consumers (Meadley, 2012)</p> <p>Misleading practice in the beverage industry -Fehrenbach (2008)</p> <p>Red Bull out of court settlement – (Australian Food News, October 2014)</p> <p>Misleading action in health industry- Swisse Vitamins Pty Ltd v The Complaints Resolution Panel (2012) (Nettleton, (2012)</p> <p>Misleading action in Optical industry -Specsavers Pty Ltd v Luxottica Retail Australia Pty Ltd [2013] FCA 648 (Norgard &amp; Dang, (2013)</p> <p>Actions taken by Consumer Affairs Victoria -Consumer Affairs Victoria, Annual Report 2013-2014)</p> <p>Problems associated with the ASR -Harker, Harker, &amp; Volkov (2001)</p> <p>Self-regulatory system used in advertising in Australia -Baker, Graham &amp; Harker (1998)</p> <p>Puffery outlawed in Mexico -Trujillo, (2007)</p> <p>Global Advertising Lawyers Alliance –Advertising Law –A Global perspective (2015)</p> | <p>P2 - Enforcement is instituted on a reactive basis.</p> <p>P3 - Consumers lack knowledge of puffery</p>     |
| 1. How effective is the regulation of puffery in online advertisements?          | <p>Productivity Commission's Review of Australia's consumer policy framework - OECD Consumer Policy Toolkit</p> <p>E-Commerce and product liability -Shapo &amp; Reeg, (2001)</p> <p>Challenges in online transactions -Smith R (2000)</p> <p>Online transactions bypass regulation -Halbert &amp; Ingulli (2005)</p> <p>General Theory of effective regulation – Normative Coherence -Sheehy B &amp; Feaver D (2011)</p>   | <p>P4 -There is a positive relationship between consumers' dissatisfaction and their avenues for remedies.</p> |



|  |  |  |
|--|--|--|
|  | <p>General Theory of effective regulation – Positive Coherence<br/>Feaver D &amp; Sheehy B (2011)</p> <p>The adoption of an appropriate test to determine level of understanding of consumer -Kapnoullas &amp; Clarke (2008)</p> <p>Processing exaggerated claims -Cowley (2006)</p> <p>A cross-national and cross-generational study of consumer acculturation to advertising appeals -Jimenez FR. et al (2013).</p> <p>Ethical ideals and business decisions -Gini, Alexei &amp; Marcoux (2009)</p> <p>Ethical lapses of marketers - Kotler (2007)</p> <p>Usage of puffery does increase profits -Chonko (1995)</p> <p>The progression of Caveat Emptor -Consumer Law Resource centre</p> <p>History of Caveat Emptor -(Pistis, (2006)</p> <p>Misleading food labelling -Jones S (2014)</p> <p>Problems caused by puffery in media -Radford (2004)</p> <p>Trust in the buyer-seller relationship -Doney &amp; Cannon, (1997)</p> <p>Benefits of ethical marketing practices -(Strutton, Hamilton &amp; Lumpkin, (1997)</p> | <p>P5 - Legal uncertainty has led to exploitation.</p> |
|--|--|--|

## 2.9 Hypotheses development

These propositions formed the basis on which the hypotheses were developed. The different variables involved made the expansion of the hypotheses necessary. The following are the Hypotheses that were refined and expanded from the Proposition Development.

**H1-** Need for verification of product knowledge highlights consumer insecurities

**H2** - Falsification distorts consumer knowledge

**H3** - Exaggeration blurs the line between acceptable and misleading practice

**H4-** Consumers uncertainty as to legal remedies enhances puffery usage

**H5-** Online advertisements increase avenues for puffery messages

**H6** - Consumers' lack of product knowledge impacts positively on marketers use of puffery

**H7** - Tenets of Puffery message increases consumers perceptions of marketer's use of puffery

The next essential step is to discuss Research Methodology. Chapter 3 that follows will provide details of the Research methodology adopted for this research. Details of the Qualitative and Quantitative research methods used to test these hypotheses will be provided. Chapters 4 and 5 will provide the findings of the research methods employed. Chapter 6 will provide the conclusions and show whether these hypotheses have been proven.

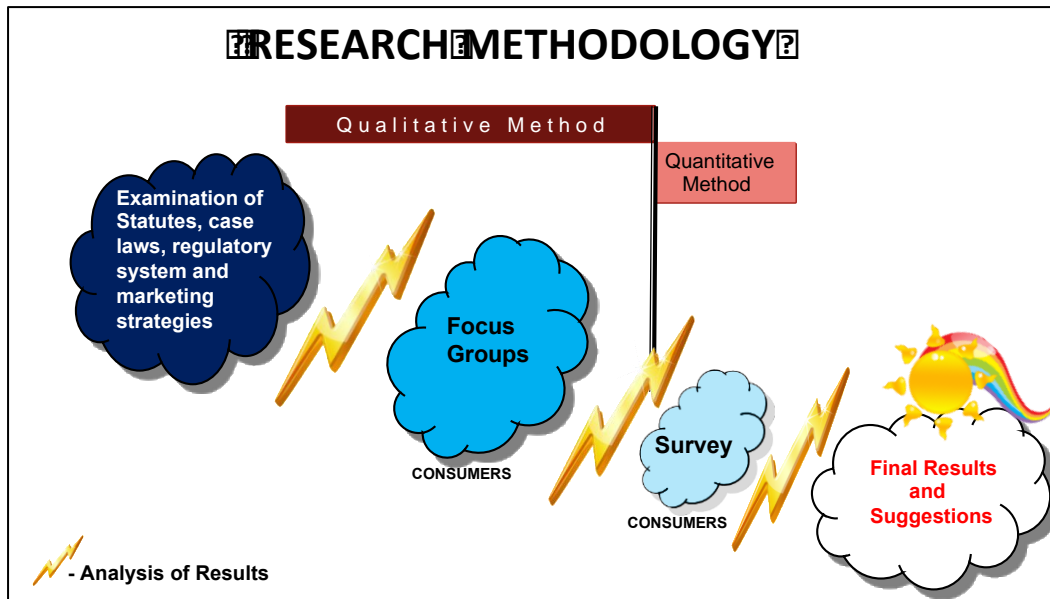
## **CHAPTER THREE: RESEARCH METHODOLOGY**

### **3.1 Introduction**

This chapter discusses the research methodology employed to explore the research questions discussed in Chapter 1. A summary of the whole process is first provided. The determination of the suitable paradigms for this research is then set out. This study utilised a mixed methods research design to cover a two-stage process. Firstly, the qualitative method of focus groups was used to explore the components related to Puffery and to develop a survey instrument. Secondly, a quantitative phase was employed to test the research hypotheses. The details relating to the two processes are provided in this chapter, while the findings and analysis can be found in Chapters 4 and 5.

### **3.2 Summary of Research Process**

Based on the Conceptual Framework (Chapter 2), decisions were made with regard to research methods that would be employed. The research methods would gather the necessary data to answer the research questions. The first step planned was the gathering of secondary data via the literature review. This included an examination of statutes, case laws, regulatory bodies, and marketing strategies. Once sufficient information was gathered and analysed, proposition and hypothesis development took place. After selecting the suitable research paradigms, qualitative and quantitative research methods were chosen to test and confirm the hypotheses. The qualitative method of focus groups and quantitative method of surveys were chosen. Focus group questions were prepared, and focus group sessions were carried out with consumers as participants. The data from these sessions were analysed and conclusions drawn. This then helped the process of survey preparation. Once the survey was administered to consumers and data were gathered from it, a thorough analysis of the validity of the results and the methods employed to gather those data was done to help draw reasonable conclusions. These conclusions helped to confirm whether the hypotheses were proven and whether suggestions for reform in the law could be made. Figure 3.1 illustrates the process.



**Figure 3.1 Research Process**

### 3.3 Research Paradigm

A common approach in research is to follow a set of theories, methods and approaches which will be included in a framework and encompassed in a research paradigm and this can then form the basis on which data is gathered (Collis & Hussey, 2003).

The term 'paradigm' may be defined as "a loose collection of logically related assumptions, concepts, or propositions that orient thinking and research" (Bogdan & Biklen 1998, p 22 cited in Mackenzie & Knipe 2006) or the philosophical intent or motivation for undertaking a study (Cohen & Manion 1994, p.38 cited in Mackenzie & Knipe 2006). The paradigm influences the way the knowledge is examined and analysed (Mertens 2005; Bogdan & Biklen 1998, cited in Mackenzie & Knipe 2006). Disciplines tend to be governed by particular paradigms, such as Positivist, Postpositivist, Constructivist, Interpretivist, Transformative, Emancipatory, Critical, Pragmatism and Deconstructivist (Mackenzie & Knipe 2006). This research used Qualitative and Quantitative methods to gather data. The following information was gathered from 'A Comprehensive Guide for Designing, Writing, Reviewing and Reporting Qualitative Research' (Qualitative Research Guidelines Project). This was done to aid with the search for suitable paradigms on which this research could be based.

Qualitative and quantitative approaches are rooted in philosophical traditions with different Epistemological and Ontological assumptions. Epistemology is the theory of knowledge and the assumptions and beliefs that we have about the nature of knowledge.

Ontology concerns the philosophy of existence and the assumptions and beliefs that we hold about the nature of being and existence (Qualitative Research Guidelines Project). The following are some of the different research paradigms that were looked to determine the basis for the research methodology.

### ***3.3.1 The Interpretivist Paradigm***

Schultz, Cicourel and Garfinkel (who have their roots in phenomenology and sociology), the Chicago School of Sociology, and Boas and Malinowski (anthropologists) are often associated with the origin of the Interpretivist paradigm (Qualitative Research Guidelines Project).

The Relativist ontology in this paradigm assumes that reality is constructed inter-subjectively through the meanings and understandings developed socially and experientially. The Subjectivist epistemology assumes that we cannot separate ourselves from what we know. By positing a reality that cannot be separate from our knowledge of it, the 'Interpretivist' paradigm posits that researchers' values are inherent in all phases of the research process. In this paradigm, findings or knowledge claims are created as an investigation proceeds and all interpretations are based in a particular moment. Typically, qualitative methods are used when this paradigm is adopted (Qualitative Research Guidelines Project).

### ***3.3.2 The Positivist Paradigm***

The origin is largely credited to Descartes but there are others who have traced it back to Galileo (Qualitative Research Guidelines Project). The Realist ontology in this paradigm assumes there is an objective reality. The Representational epistemology assumes that people can know this reality and use symbols to accurately describe and explain this objective reality. By positing a reality separate from our knowledge of it, this paradigm provides an objective reality against which researchers can compare their claims and ascertain truth. Prediction and control - assumes that there are general patterns of cause and effect that can be used as a basis for predicting and controlling natural phenomenon. The paradigm states that we can rely on our perceptions of the world to provide us with accurate data for empirical verification. Any research carried out is deemed to be free of subjective bias and objectivity will be achieved. Research carried out (typically quantitative and experimental methods) is evaluated based on three criteria: Validity, Reliability and Generalizability. Typically, quantitative methods are used when this paradigm is adopted (Qualitative Research Guidelines Project).

### ***3.3.3 Critical or Subtle Realist Paradigm***

This paradigm can be seen reflected in the work of Hammersley, Silverman, Creswell, Kirk, Miller and others (Qualitative Research Guidelines Project). The Realist ontology in this paradigm assumes that there is an objective reality and that we can only know reality from our own perspective of it. The Transactional epistemology states that we cannot separate ourselves from what we know. By positing a reality that can be separate from our knowledge of it, the paradigm provides an objective reality against which researchers can compare their claims and the extent to which they ascertain truth.

Realist approaches tend to rely on a combination of qualitative and quantitative methods. It incorporates methods to elicit participants' ways of knowing and seeing (interview, observation, text). Realist perspectives are grounded in a theoretical belief that our knowledge of reality is imperfect and that we can only know reality from our perspective of it. Realists have developed a variety of alternatives to the concept of validity that are seen as appropriate for qualitative research. These include confidentiality, credibility, plausibility and relevance (Qualitative Research Guidelines Project).

### ***3.3.4 Critical Theory Paradigm***

Critical theorists mark the 'linguistic turn' associated with Wittgenstein as a moment in history where we could begin to see how our reality was interactively constructed through language. Our conceptual system and how things are defined in society are created through language. Language guides and limits the observational process. The stability of the language system produces the stability of a shared reality (Qualitative Research Guidelines Project)

### ***3.3.5 Phenomenological Paradigm***

The purpose of the phenomenological approach is to identify phenomena through how they are perceived by the actors in a situation. It involves gathering 'deep' information and perceptions through inductive, qualitative methods such as interviews, discussions and participant observation, and representing it from the perspective of the research participant(s). Epistemologically, phenomenological approaches emphasise the importance of personal perspective and interpretation. They are powerful for understanding subjective experience, gaining insights into people's motivations and actions (Lester, 1999)

### **3.3.6 Constructivist Paradigm**

Constructivism is a theory based on observation and scientific study about how people learn. It has roots in philosophy, psychology, sociology, and education (Bada, S 2015). It says that people construct their own understanding and knowledge of the world through experiencing things and reflecting on those experiences (Bereiter, 1994 cited in Bada, S 2015). When we encounter something new, we have to reconcile it with our previous ideas and experience, maybe changing what we believe, or maybe discarding the new information as irrelevant. In any case, we are active creators of our own knowledge. To do this, we must ask questions, explore, and assess what we know. Constructivism's central idea is that human learning is constructed, that learners build new knowledge upon the foundation of previous learning (Bada, S 2015).

Once an examination was made of the different paradigms, a determination was made as to what would be used for this research.

### **3.4 Determination of the relevant paradigms for this research**

After a close examination of all the paradigms above, certain conclusions were drawn.

The two research paradigms that do have a considerable impact in Marketing research are the Interpretivist and Positivist paradigms (Collis & Hussey, 2003). The Interpretivist paradigm is suitable as findings or knowledge claims are created as an investigation proceeds and all interpretations are based in a particular moment. The relevance of data gathered in this research builds upon ideas or beliefs shared by the investigator, and thus this paradigm is appropriate. The Interpretivist paradigm uses qualitative methods and normally involves usage of in-depth interviews, observation, focus groups or case studies to elicit required data and find out the related phenomenon. The method of data analysis involves an inductive approach (Blaikie, 1993). The belief that there may be a need for further regulation in Puffery is to be confirmed by findings that are relevant to this particular moment in time. This consideration made this paradigm favourable.

Positivism provides an objective reality against which researchers can compare their claims and ascertain truth and that suits this research. This research is challenging established perceptions about puffery, and thus the general patterns of cause and effect can be used as a basis for predicting purchasing decisions. Positivism is a paradigm in which Quantitative methods can be used and many social theories find their roots in it. In this approach, researchers endeavour to collect large amounts of quantitative data and thus Statistics and questionnaires

are commonly used. The features mentioned above made this a suitable choice for a paradigm as well.

The Phenomenological paradigm also has a bearing on this research as well with regard to discovering motivations behind consumers' decisions. The paradigm emphasises the importance of personal perspective and interpretation to identify phenomena as they are perceived by the actors in a situation. It is a powerful tool for understanding subjective experience, and gaining insights into people's motivations and actions (Lester, 1999). This is suitable as this research examines the effect of puffery and the motivations behind purchases made by consumers. This has a bearing on both research methods chosen, as it seeks to investigate purchase intentions and the effect of puffery on them.

The Critical Theory and Constructivism were found unsuitable for the following reasons. Critical Theory and Constructivism are not very suited for research in the Marketing area (Perry, Riege & Brown 1999, pp 16-25). Constructivism has its limitations especially with this research project as it does not take into account technological and economic situations (Hunt 1999, cited in Perry, Riege & Brown 1999). The rapid change in technology and its direct implications on marketing is one of the major factors examined in this research and thus it makes this paradigm unsuitable. The Critical Theory is unsuitable because expecting information on historical, emotional, psychological and social structures from participants is unrealistic. Most business network research does not aim at changing the actions of the decision makers or their approaches to strategy formulation but at understanding the actions (Guba & Lincoln, 1994 cited in Perry, Riege & Brown 1999). Although this research seeks to find out whether changes should be made as to how marketing is done, it is equally imperative to understand what drives marketing decisions and thus this paradigm may not be wholly suitable. Critical theory has a tendency to lean towards elitism (Clark n.d). Critical theorists tend to assume that they are more capable of analyzing a situation than most others are, and also better equipped to offer a proscriptive plan of action. Critics thus conclude that the insights of Critical theorists are naive and unworkable in the contemporary setting. Manning (1997) observes that Constructivism and Critical theory are value-laden and assume a subjective relationship between the researcher and the respondent. The assumption in Constructivism and Critical theory research that reality is a subjective construction is inappropriate for marketing management (Sobh & Perry 2006). Bazeley (2004) notes that, in Constructivism and Critical theory research, findings are related to individual views of the world. Marketing management however involves comparing and managing many constructed realities.



It must be noted, however, that there is a growing trend (Goulding 1999; Belk, R, Fischer, E & Kozinets, R 2012) towards investigating marketing phenomena by applying the Critical theory and Constructivism. Marketing journals such as *Marketing Theory* provide ample evidence of the versatility of Critical theory and Constructivism. In the present research it was still felt that these evidences did not outweigh the many criticisms that pointed to their unsuitability for marketing research. The specific nature of this research also made usage of the other paradigms that were chosen to be more appropriate.

The final decision was that this research would be based on the Interpretivist and Positivist paradigms. Two paradigms were chosen due to their unique nature that matched the requirements of this research. The exploratory nature of this research would fit well in the Positivist paradigm. The testing of beliefs in this research sat well with the Interpretivist paradigm. The decision was thus to employ a mixed method of Qualitative as well as Quantitative methods to gather responses. This was based upon the common methods that were characteristic of these two paradigms. The qualitative research method used in this research is based upon the Interpretivist paradigm. Focus groups were identified to be suitable for gathering information. The Quantitative research method used in this research is based upon the Positivist paradigm. This research decided on usage of a Survey for collecting data and testing the hypotheses.

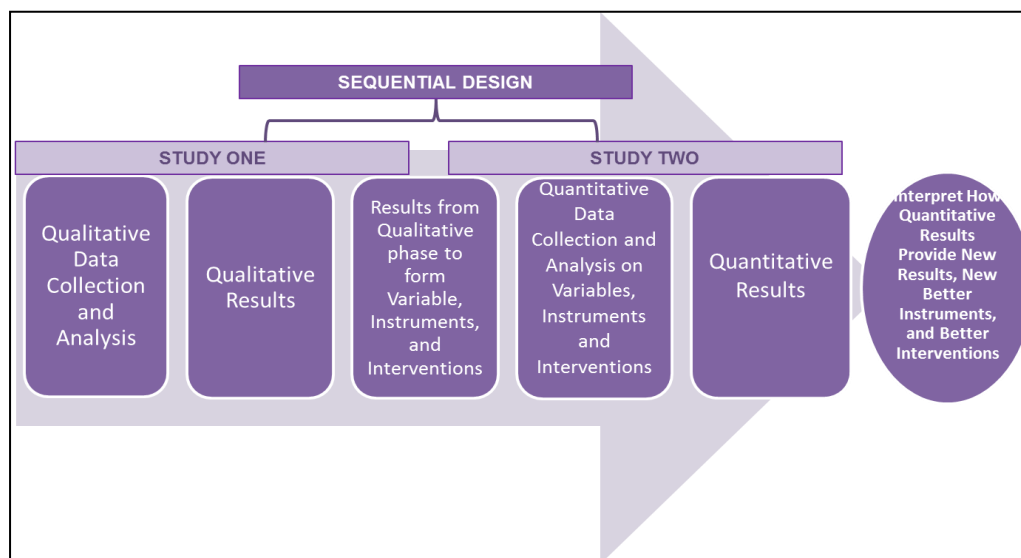
### **3.5. The Mixed Methods Design**

Creswell and Clark (2007 p. 5) defined mixed methods as follows:

“Mixed methods research is a research design with philosophical assumptions as well as methods of inquiry. As a methodology, it involves philosophical assumptions that guide the direction of the collection and analysis of data and the mixture of qualitative and quantitative data in a single study or series of studies.”

Tashakkori and Teddlie (2010) state the purpose of mixed methods research as being that the two methods provide a better insight into a research problem or issue. Creswell (2009, p. 211) states that the sequential exploratory strategy is a mixed methods approach where the second phase of quantitative data collection and analysis builds on the results of the first qualitative phase. Many marketing researchers have advocated the use of mixed methods in order to understand marketing phenomena better (Creswell, 2008; Harrison & Reilly, 2011; Hart, 1987 and Ofek, 2010). Mixed methods research has been used by many researchers

(Arora, 2011; Bazeley, 2004; Parry, Kupiec-Teahan, & Rowley, 2012). This approach has become the third methodological movement (Cameron & Miller, 2007).



**Figure 3.2 Mixed Methods with Sequential Design**

This mixed methods design was felt to be appropriate for this research because consumers' perceptions about the components that impact upon puffery needed to be gathered. These initial findings would then help formulate a second research instrument that built upon initial findings. The second method of research would then confirm initial findings or explore areas that had not been adequately tapped into in the first round of investigation. Creswell (2011) states that there are three levels to this approach. The first level involves collecting data and analysing it. The second level involves using the analysis to develop the final research model; and the third level is administering the instruments for qualitative data collection and analysis. A similar approach is taken in this research. The research questions and hypotheses developed provided the basis for the questions for the focus groups. The analysis of the responses helped to form templates for questions for the survey. The Questionnaire Matrix helped to refine the questions for the survey. The findings of the survey were then analysed to test the hypotheses and eventually provide answers to the research questions.

However, inconsistencies can result from the research paradigms used in mixed methods research (Bazeley, 2004; Harrison & Reilly, 2011; Hewege, 2011). Cameron & Miller (2007) and Guba & Lincoln (1994) observe that paradigm wars can result from mixing quantitative and qualitative research methods without logical explanations. Positivistic research has been

criticised for being overly biased towards structure, whereas highly qualitative research has been criticised for its overemphasis on individual subjectivity (human agency) (Ryan et al. 2012).

### **The Structure and Agency debate**

Agency relates to a research approach focusing on human subjectivity. Van Gamberg (2006) states that this occurs at an individual level within a defined boundary and context. It also occurs at an organisational level where it concerns an individual's subjectivity relating to aspects of work in the organisation (Hewege & Perera 2013)

Layder (1997) argues that relying solely on the agency approach creates a risk of reducing rich social actions to the subjective experience of social actors at a micro level. Eisenhardt (1989) adds that unconventional theories can also develop from reliance on the agency approach.

The structural approach is perhaps the opposite of the agency approach. It focuses on social structure and the effects it has on social actors. Social structure refers to institutionalised relationships between social positions and practices at different levels of social strata (Giddens, cited in Hewege & Perera 2013).

Van Gamberg (2006) posits that an assessment of the nature of the structure involves taking into account theories of wealth and power, social and cultural anthropology, symbolism, and mass communication. Layder (1998) observes that most survey-based quantitative studies have been criticised for their overreliance on structural aspects.

The lack of an appropriate balance between structure and agency tends to render findings of academic marketing research inaccurate.

Hewege and Perera (2013) state that Layder's adaptive theory methodology can overcome two main methodological issues affecting academic marketing research, namely:

- (1) paradigm dilemmas caused by the mixed methods approach; and
- (2) apparent imbalance between agency (individual subjectivity) and structure (social structure).

Layder combines both agency and structure together in a single approach (Hewege & Perera 2013). This helps create a link between 'human activity and its social contexts' (Layder, 1994, p. 5). Adaptive theory uses both inductive and deductive procedures for developing and elaborating theory (Layder, 1998). It involves usage of social theories to underline social

structures on which social actions are based. This helps improve the quality of the findings, thereby resolving most of the paradigm dilemmas found in mixed method research (Hewege & Perera 2013). Adaptive theory embraces both objectivism and subjectivism (Layder, 1998) and this clears most of the ontological dilemmas.

Adaptive theory enables a researcher to have a combination of a primary and a secondary method of data collection. The primary method of data collection could be in-depth interviews or focus group sessions, and the secondary methods could be a survey and a review of documents and reports, relevant laws and relevant media publications (Hewege & Perera 2013). In this research, focus group sessions and an online survey were carried out. The questions were formulated based on reviewed reports, relevant laws in place in Australia and relevant media publications of regulatory bodies such as the ACCC and Consumer Affairs Victoria.

At the end of each data collection method employed, notes should be taken and reviewed together with reflective practices, thereby interpreting data in terms of social theories (Layder 1998). This was done in this research. Notes of focus group and survey responses were analysed in line with existing theories on puffery. Next there should be identification of emerging themes in line with the research questions (Van Gramberg 2006). This was also done in this research for the focus group sessions and can be seen in Chapter 4, 4.3. Findings are summarised in the Questionnaire matrix in Chapter 4, Table 4.1. For the survey conducted, the identification of emerging themes can be found in Chapter 5, 5.2 Survey questions and responses. This is then followed with grouping of similar themes into concepts and assessment of these concepts in relation to social theories used in the study (Layder 1998). The data gathered in this research via focus groups also had grouping of similar themes into broad areas to refine the areas for further questioning via the survey. The questions were finalized based on established theories and literature reviewed. The last step is the development of a new theory or adaptation to the existing theory (Layder 1998). In this research, the analysis of the findings led to conclusions that existing concepts such as Caveat emptor that underpin puffery should be reconsidered, and existing theories on the status of puffery needed re-examination.

The steps taken in this research have tried to be in line with measures advocated by Layder's adaptive theory to overcome effects of mismatches and paradigm dilemmas. The focus on consumers in both the qualitative and quantitative methods employed brought some subjectivity, but this was balanced with the objectivity of existing theory that underlies the area of puffery.

### ***3.5.1 Qualitative Research***

Once the paradigms were chosen and the research methods identified, the Qualitative research method was embarked upon. Qualitative research involves the usage of specified methods to gather data about views and perceptions held by participants regarding determined subject matter. The process allows more flexibility than other methods because of its nature. One of the most common qualitative methods, focus groups was the chosen method to elicit specific data in this research.

#### ***3.5.1.1 Focus Groups***

The first step involved formulating a template for the focus group sessions. The questions were designed based on information gathered from secondary data and literature review. The questions were targeted at answering the research questions and testing the propositions developed.

Once this was done, a centralised venue was selected for the running of the focus group sessions. A meeting room was booked at the venue for the purpose of the focus group sessions. The following venue was deemed appropriate because of its location that made it a focal point for participants who would come from different postcodes of Melbourne:

Mount Street Neighbourhood House (Glen Waverley)

Address: 6 Mount Street, Glen Waverley 3150

The next step was to form the focus groups (3 groups consisting of 8 members each) from consumers who have shopped online. The purpose was to elicit more information about their knowledge of puffery and the law relating to misleading conduct. Participants were identified via a database and a recruitment advertisement (see Appendix) was sent out to them to request participation. The gathering of participants was done via a database of consumers that was obtained from Data Solutions, a repository that provides details of consumers who have agreed to participate in research projects. This company was selected as it was found to operate under strict ethical standards. For the purposes of the focus groups, a judgmental approach based on characteristics was used to source out potential participants. Participants in focus groups had to be 18 years and over and had shopped online to qualify as the purpose of the research is targeting online purchasers. Participants chosen ranged from the ages of 21-50. 60% of the participants ranged from the ages of 21-30. 30% ranged from the ages of 31-40 and 10% from the ages of 41-50. The concentration of participants in the various age groups were targeted for

the following reason. Statistics have shown that with regards to researching products online before buying them online, 20 - 30-year-olds did this roughly twice as much as 30 - 40-year-olds and almost four times as much as 50 - 60+ year-olds (Digital marketing Report 2014).

Secondly the participants chosen had all shopped online an average of five times or more in the past which alluded to the awareness of the process and frequency of usage. The third criterion was that the participants were chosen from different suburbs that ranged from the city area, Balwyn, Glen Waverley, Berwick, Footscray and Pakenham, reflecting the different demographics of population concentration. Participants targeted were also chosen from different professions and included students as well as a small percentage of those who were working from home or not actively employed.

There were 12 male participants and 12 female participants selected but on the actual date of the focus group 1 of the female participants did not turn up. The first and second focus group session had 7 participants each and the last one had 9 participants.

A professional moderator was engaged to run the focus group sessions. The Chief Investigator was also present in order to supervise proceedings. Participants were given their Participant Information and Consent Forms upon arrival at the focus group venue and were given the opportunity to read through and sign their consent to participation in the focus group. Any questions they had were answered and points clarified.

A note taker and the principal research student took down notes of the proceedings. There was also audio recording of the sessions. Anonymity of the participants was maintained at all times and participants were labelled as Participant 1, Participant 2 and so forth. Each session ran for approximately 55 minutes and ten questions were used to elicit information and sharing of opinions from the participants. There were no issues of breach of confidentiality as there were no intrusive questions asked. Questions only pertained to puffery and its effects.

The questions formulated for the focus group sessions were based on the components identified in the Conceptual framework for this research. The components are as follows:

1. Puffery
2. Promotions
3. Consumers
4. Statutes and case law,
5. Regulatory Bodies
6. Online transactions

Based on findings from the secondary data gathered, the following questions were deemed to be the most appropriate for eliciting information from consumers;

1. *What is your understanding of puffery used in advertisements?*
2. *What are some examples of puffery used in advertisements?*
3. *Why do you think puffery is used?*
4. *How does the consumer become aware of puffery in an online setting?*
5. *How much is a customer expected to know about the products they are purchasing?*
6. *Do you think online shopping poses challenges to consumers? If yes, what are these challenges?*
7. *Have you been misled by any advertisements online? If yes, did you get a remedy?*
8. *What protection are you given against misleading advertisements and is this protection sufficient?*
9. *Do you think misleading practices by marketers and advertisers is a problem in Australia? If yes, how big a problem do you think it is?*
10. *Are there any alternatives to usage of puffery that marketers can use?*

The responses and discussions that were taken down via notes and audio recordings. The next required step was transcribing to the sessions. This helped to identify the key factors, and compare issues in and across groups. It also helped determine the consumer's point of view on this subject. Findings are presented in Chapter 4. Themes were drawn and inferences were made. Conclusions were also arrived at. Possible questions for the Survey stage of this research were also formulated, based on all the data gathered. This research method helped answer the following research question:

***Is the current regulation of puffery in online advertisements adequate?***

The results gathered helped in refining the survey instrument, which is part of the quantitative approach. This represents the second stage of data gathering for this research. Surveys sit within the realm of quantitative research.

### ***3.5.2 Quantitative Research***

The quantitative research that was carried out took a year to complete from conception to conclusion. The process is detailed as follows.

#### *July 2015 - January 2016*

The quantitative stage of this research was embarked upon after the Focus Group stage was completed and analysed. The survey instrument, that took the form of a questionnaire, was developed. Due consideration was taken of data that had been gathered and analyzed up to that point. Questions for the survey were formulated with due consideration of how they would link to answering the Research Questions and substantiating the propositions / hypotheses of the research. The process involved a few stages of refinement of the questions.

The survey instrument (questionnaire) was used and targeted at consumers who made online purchases. The purpose of this was to gather information about the knowledge of the consumer about puffery and how cognisant they were of available remedies for misleading conduct. This helped reconcile expectation of marketers about a customer's knowledge of what is puffery and the actual knowledge ascribed to customers in this matter. The Questionnaire and the Participant Information form (see Appendix III) were prepared and distributed to participants.

#### *February - March 2016*

Surveys were done online. Questions were on RMIT website and were set up using Qualtrics. Qualtrics is a powerful online survey tool that allows one to build surveys, distribute surveys, and analyze responses, from one convenient online location. For the purposes of the survey, Data Solutions requested 200 participants to take part in the survey. The age ranges targeted for participants fell within 18-20 years, 21-30 years, 31-40 years, 41-50 years, 51-60 years, and above 60 years. A recruitment advertisement was prepared for this purpose (see Appendix II). Participants were directed to the survey hosted by the RMIT website. The survey took approximately 15 minutes to complete. The online survey gathered responses from 94 participants in total. 9 participants fell within the 18-20 years range, 21 participants fell within the 21-30 years range, 17 fell within 31-40 years range, 30 participants fell within the 41-50



years range, 10 participants fell within 51-60 years range, and 5 fell within the above 60 years range.

The survey provided necessary data from consumers who had shopped online before.

#### *April 2016 -May 2016*

The survey instrument developed utilized the latest psychometric scaling techniques to ensure the validity and reliability of the data collected. Standard attitudinal and perceptual scaling methods were used whenever possible to provide the best estimates of participants' key views. All data were thoroughly examined by the researchers to ensure their accuracy. Partial Least Square-Structured Equation Modelling (PLS-SEM) was chosen as the method for analysing the data. SmartPLS, one of the leading software tools for PLS-SEM, was used to interpret the data. The Research Model was derived. The structural components of both the measurement and structural model were then rigorously tested to determine the validity of the model to generate results that could be used to draw conclusions.

#### *June 2016*

Once the validity of the results was determined, conclusions were drawn from the findings. All the findings from the focus groups, survey and secondary data gathered were then analyzed with their relevance to answering the research questions. The findings of these methods combined with the analysis of case laws and the self-regulatory system provided the composite picture of the area. The results gathered provide the required evidence to conclude that possible reforms, in the form of tighter regulation, are necessary to be considered. Final conclusions were made and recommendations put forward.

The process of how the questions were formulated can be seen at the end of Chapter 4 after the analysis of the findings of the Focus Group. This is because the questions were developed after due consideration of Secondary data and Focus Group findings. For the purpose of a logical flow of information, the process will be discussed at that point. Analysis of the Survey findings is provided in Chapter 5. The full breakdown of questions with responses can also be seen in Chapter 5 but a sample list of the questions is also provided here. The first question in the survey related to information about the Survey and for agreement to participate in the survey. The other questions were as follows:

*Q2. How many times have you done online shopping before?*

- Q3. *What is puffery?*
- Q4. *What is the frequency of usage of puffery in online advertisements?*
- Q5. *How do you determine that puffery has been used?*
- Q6. *How frequently do you use the following sources to verify claims made in online advertisements?*
- Q7. *Why do marketers use puffery?*
- Q8. *Describe the accuracy of the following statement with regard to your own experience with online purchasing. Online purchasing is challenging.*
- Q9. *If online purchasing poses a considerable challenge, which of the following may be the reason for it?*
- Q10. *To what extent is it important for a consumer to have the following categories of knowledge about the product/s they are going to purchase online?*
- Q11. *Where can misleading online advertisements be found?*
- Q12. *Have you been misled by an online advertisements before?*
- (Questions 13,14, 15 and 16 were to be answered if Yes was selected for Question 12)*
- Q13. *Have you ever managed to get a remedy for being misled by an online advertisement?*
- Q14. *One of the reasons you were misled by the online advertisement was because of the puffery used.*
- Q15. *Did the puffery used:*
- a) convince you that the claims made were true?*
  - b) confuse you as to what was true and what was not?*
  - c) seem not believable but nonetheless made the product more appealing?*
  - d) raise a hope in you that it would be true?*

*Q16. Other possible reasons why you were misled by the online advertisement/s was because:*

- a) you could not verify authenticity of the claim made.*
- b) the advertisement was confusing.*
- c) of the urgency in which you had to make decisions regarding the purchase of the product.*
- d) you were distracted by pop-ups.*

*(This Question was to be answered if 'No' was selected for Question 12)*

*Q17. You were never misled by online advertisements before because:*

- a) you understood the difference between the puffery used and what was misleading.*
- b) you verified the authenticity of the claims before making a purchase.*
- c) the advertisements were not misleading.*
- d) you were well informed about the product you were purchasing.*

*Q18. To what extent do you agree with the following statement? Misleading online advertisements are a serious problem.*

*Q19. What is the possibility of this problem growing?*

*(Question 20 was to be answered if 'No' was selected for Question 13)*

*Q20. Is it possible to obtain a remedy if you are misled by an online advertisement?*

*Q21. What is the avenue open to you if you have been misled by an online advertisement?*

*Q22. To what extent do you agree with the following statement? It is difficult to obtain a remedy for being misled by puffery in an online purchase.*

*(If Somewhat Disagree or Strongly Disagree is selected then skip to Question 24)*

*Q23. If obtaining a remedy poses a certain amount of difficulty, could any of the following be a reason for it?*

- a) Cost.*
- b) It may be time consuming.*
- c) It may not be protected by Australian Law.*
- d) There may be evidential difficulties in proving your case.*

*Q24. Is it possible for marketers to promote their products successfully without usage of puffery?*

*(The questions below are Demographic Profile questions and are used for data analysis purpose only. Responses will be kept confidential.)*

*Q25. What is your gender?*

*Q26. What age group do you fall in?*

*Q27. What is the highest level of your academic qualification?*

The data collected from the answers provided helped to answer the second subsidiary research question:

***Is the regulation of puffery in the area of online advertisements effective?***

The data gathered from all these sources impacted upon existing legal and marketing theory and helped to decide if there is a need for increased regulation in the area. It helped determine if changes would make it too onerous for marketers to be able to successfully market their products. The question of whether marketing could be more ethical was also answered.

### **3.6 Conclusion**

This chapter discussed the summary of the research methodology and the process of determination of the Interpretivist and Positivist paradigms as the basis for research methods employed. The rationale behind usage of mixed methods was explained. The qualitative method of Focus Groups and quantitative method of Surveys employed were set out in detail. The questions used in both research methods were set out and the measures adopted to analyse

the responses were also given. Chapter 4 sets out the responses, inferences drawn from the focus group sessions, and analysis of the findings. It will also detail the process of refinement of questions for the survey via the Questionnaire Matrix. Chapter 5 will discuss the responses to the survey and the analysis of them. Chapter 5 will also discuss the testing of the survey used for reliability and validity of results.

## CHAPTER FOUR: FOCUS GROUP FINDINGS AND ANALYSIS

### 4.1 Introduction

This chapter examines the findings and the analysis of responses gathered from the focus group sessions. The basis for the questions is explained and targeted areas outlined. The responses to the questions and the inferences drawn from them are then provided. The inferences drawn from each focus group question were used to formulate preliminary questions for the next stage of research, the survey. The preliminary questions formulated are given in this chapter. The next part of this chapter details the analysis of the findings and once again divides the findings into the different components under which they fall. The last part of this chapter provides details of the process of refining the preliminary questions via the usage of the Questionnaire Matrix. The Questionnaire Matrix helped to formulate final questions for the survey.

### 4.2 Scope of Questions

The questions posed to the focus groups covered all six components that were highlighted in the Conceptual Framework for this research (discussed in Chapter 2).

The six components are:

1. Puffery
2. Promotions
3. Consumers
4. Statutes and case law,
5. Regulatory Bodies
6. Online transactions

Based on findings from the secondary data gathered, the following questions were deemed to be the most appropriate for eliciting necessary information from consumers. Specific questions were targeted at the different components. The following is a breakdown of the questions that addressed the six components:

#### *Puffery and Consumers*

1. What is your understanding of puffery used in advertisements?
2. What are some examples of puffery used in advertisements?

#### *Puffery, Promotions and Consumers*

3. Why do you think puffery is used?

*Puffery, Consumers and Online transactions*

4. How does the consumer become aware of puffery in an online setting?

5. How much is a customer expected to know about the products they are purchasing?

*Online transactions*

6. Do you think online shopping poses challenges to consumers? If yes, what are these challenges?

*Consumers, Statutes and case law*

7. Have you been misled by any advertisements online? If yes, did you get a remedy?

*Statutes and case laws and Regulatory Bodies*

8. What protection are you given against misleading advertisements and is this protection sufficient?

*Promotions and Regulatory Bodies*

9. Do you think misleading practices by marketers and advertisers is a problem in Australia? If yes, how big a problem do you think it is?

10. Are there any alternatives to usage of puffery that marketers can use?

The responses were recorded on the basis of a checklist that was prepared. Table 4.1 has been provided to show how detailed individual responses of participants were recorded for each question for each focus group.

**Table 4.1 Record of responses**

| Focus Group<br>Session One | <b>Q1. What is your understanding of puffery used in advertisements?</b> |
|----------------------------|--|
|                            | Participants' responses  |
| Participant 1              |  |
| Participant 2              |  |
| Participant 3              |  |
| Participant 4              |  |

|               |  |
|---------------|--|
| Participant 5 |  |
| Participant 6 |  |
| Participant 7 |  |
| Participant 8 |  |

A summary of the participants' responses to inferred conclusions from the questions was then made. Tables 4.2, 4.3 and 4.4 illustrate the responses from each focus group session. The responses were broadly categorized as a 'Yes' or 'No' based on the final implication of their views.

**Table 4.2: Focus Group One**

| Inference from questions  | Participant response |        |        |             |        |        |        |
|---|----------------------|--------|--------|-------------|--------|--------|--------|
|   | Y - yes              |        |        |             | N - no |        |        |
|   | P<br>1               | P<br>2 | P<br>3 | P<br>4      | P<br>5 | P<br>6 | P<br>7 |
| 1. Puffery can be misleading  | Y                    | Y      | Y      | Y           | Y      | Y      | Y      |
| 2. Consumers recognize puffery in ads                                 | Y                    | Y      | Y      | N           | Y      | Y      | Y      |
| 3. Consumers feel that there is a legitimate motive for puffery usage | Y                    | Y      | Y      | Y<br>&<br>N | Y      | Y      | N      |
| 4. Puffery is easy to identify  | Y                    | Y      | N      | N           | Y      | Y      | N      |
| 5. Consumers should have good knowledge of products prior to purchase | N                    | N      | Y      | Y           | Y      | Y      | Y      |
| 6. Online purchasing is challenging                                   | N                    | N      | Y      | Y           | Y      | Y      | Y      |
| 7. Consumers have been misled by puffery                              | Y                    | Y      | Y      | Y           | Y      | Y      | Y      |
| 8. Consumers aware of who provided protection                         | Y                    | Y      | Y      | Y           | Y      | Y      | Y      |
| 9. Protection for consumers is sufficient                             | Y                    | Y      | Y      | N           | Y      | Y      | N      |
| 10. Misleading practices is a big problem                             | Y                    | N      | Y      | Y           | Y      | N      | Y      |
| 11. There are alternatives to puffery usage                           | Y                    | Y      | Y      | Y           | Y      | N      | Y      |

**Table 4.3: Focus Group Two**

| Inference from questions     | Participant response |        |        |        |        |        |        |
|------------------------------|----------------------|--------|--------|--------|--------|--------|--------|
|                              | Y - yes              |        |        |        | N - no |        |        |
|                              | P<br>1               | P<br>2 | P<br>3 | P<br>4 | P<br>5 | P<br>6 | P<br>7 |
| 1. Puffery can be misleading | Y                    | Y      | Y      | N      | Y      | Y      | Y      |



|   |   |   |   |   |   |   |   |
|---|---|---|---|---|---|---|---|
| 2. Consumers recognize puffery in ads                                 | Y | Y | N | Y | Y | Y | Y |
| 3. Consumers feel there is a legitimate motive for puffery usage      | Y | Y | N | Y | N | Y | N |
| 4. Puffery is easy to identify  | Y | Y | N | N | Y | Y | N |
| 5. Consumers should have good knowledge of products prior to purchase | Y | Y | Y | Y | N | N | Y |
| 6. Online purchasing is challenging                                   | Y | Y | Y | Y | Y | N | Y |
| 7. Consumers have been misled by puffery                              | N | Y | Y | Y | Y | Y | Y |
| 8. Consumers aware of who provided protection                         | N | Y | Y | Y | Y | N | Y |
| 9. Protection for consumers is sufficient                             | N | N | Y | Y | Y | N | Y |
| 10. Misleading practices is a big problem                             | Y | Y | N | N | Y | Y | Y |
| 11. There are alternatives to puffery usage                           | Y | Y | Y | Y | Y | N | Y |

**Table 4.4: Focus group 3**

| Inference from questions  | Participant response |   |   |   |   |   |   |   |   |
|---|----------------------|---|---|---|---|---|---|---|---|
|   | Y - yes N - no       |   |   |   |   |   |   |   |   |
|   | 1                    | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 |
| 1. Puffery can be misleading  | N                    | Y | Y | Y | Y | N | Y | Y | Y |
| 2. Consumers recognize puffery in ads                                 | Y                    | Y | Y | Y | Y | Y | Y | Y | Y |
| 3. Consumers feel there is a legitimate motive for puffery usage      | Y                    | N | N | Y | N | Y | N | Y | N |
| 4. Puffery is easy to identify  | Y                    | Y | Y | Y | N | Y | Y | Y | N |
| 5. Consumers should have good knowledge of products prior to purchase | Y                    | N | Y | Y | Y | Y | Y | Y | Y |
| 6. Online purchasing is challenging                                   | Y                    | N | Y | Y | Y | Y | Y | Y | Y |
| 7. Consumers have been misled by puffery                              | N                    | Y | Y | Y | Y | Y | Y | N | Y |
| 8. Consumers aware of who provided protection                         | N                    | Y | Y | Y | Y | Y | Y | N | Y |
| 9. Protection for consumers is sufficient                             | N                    | Y | Y | N | Y | Y | N | N | Y |
| 10. Misleading practices is a big problem                             | N                    | Y | N | Y | Y | N | Y | Y | Y |
| 11. There are alternatives to puffery usage                           | Y                    | Y | Y | Y | Y | N | Y | Y | Y |

The responses of all three focus group sessions were then totaled up and percentages derived. The totals and percentages are shown in Table 4.5.

**Table 4.5: Derivation of percentages**

| Inference from questions  | Participant responses |           |        |           |
|---|-----------------------|-----------|--------|-----------|
|   | Y - yes               |           | N - no |           |
|   | Y                     | Y<br>in % | N      | N<br>in % |
| 1. Puffery can be misleading  | 20/23                 | 86%       | 3/23   | 14%       |
| 2. Consumers recognize puffery in ads                                 | 21/23                 | 91%       | 2/23   | 9%        |
| 3. Consumers feel there is a legitimate motive for puffery usage      | 13.5/23               | 58%       | 9.5/23 | 42%       |
| 4. Puffery is easy to identify  | 15/23                 | 65%       | 8/23   | 35%       |
| 5. Consumers should have good knowledge of products prior to purchase | 18/23                 | 78%       | 5/23   | 22%       |
| 6. Online purchasing is challenging                                   | 19/23                 | 82%       | 4/23   | 18%       |
| 7. Consumers have been misled by puffery                              | 20/23                 | 86%       | 3/23   | 14%       |
| 8. Consumers aware of who provided protection                         | 19/23                 | 82%       | 4/23   | 18%       |
| 9. Protection for consumers is sufficient                             | 14/23                 | 60%       | 9/23   | 40%       |
| 10. Misleading practices is a big problem                             | 16/23                 | 69%       | 7/23   | 31%       |
| 11. There are alternatives to puffery usage                           | 20/23                 | 86%       | 3/23   | 14%       |

The analysis of the findings will be presented after details of the findings are given. The following are the details of the findings in the form of responses, inferences drawn and preliminary formulation of possible questions for the next stage of research, the survey.

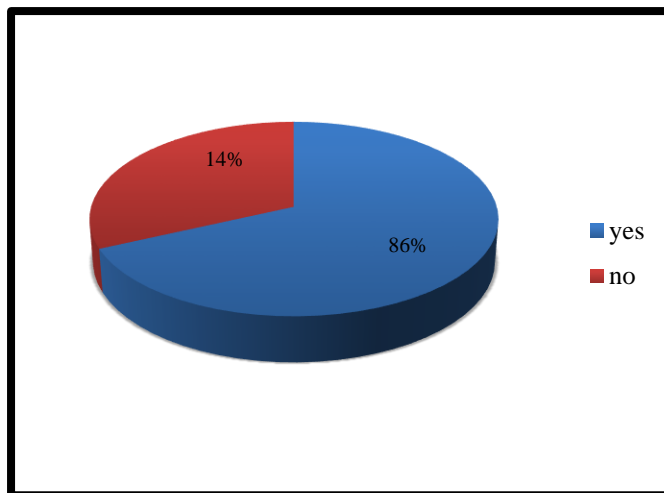
### 4.3 Findings

#### 4.3.1 Focus Group Question One

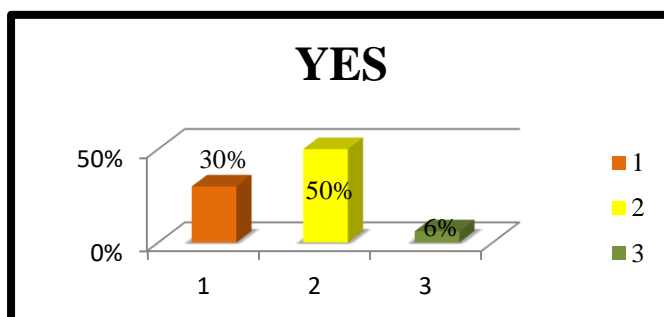
*What is your understanding of puffery used in advertisements?*

*Component: Puffery and Consumers*

Sub-heading: Consumer understanding



**Figure 4.1a: What is your understanding of puffery used in advertisements?**



**Figure 4.1b: Yes responses**

1-Misrepresentation 2- Exaggeration 3- Blurs the line

86% of the responses indicated that they had knowledge of what puffery was, while 14% said they had no idea of what it meant. From that 86% of responses, it was interesting to note that 30% thought that it was a misrepresentation, 50% felt it was hyperbole, an exaggerated statement, and 6% thought it was something that made consumers unsure about what was true.

#### *Theme*

Possibility of misleading conduct

#### *Inference drawn*

Firstly, most consumers have an understanding of what puffery is. Secondly, there is a proportion of consumers who think it is a misleading practice.

### Summary of individual comments

|  |
|--|
| An exaggerated claim                           |
| No clue  |
| Something you picture that is not true         |
| Hyperbole statement                            |
| A misrepresentation                            |
| Hype up something to promote it                |
| Something that plays with our psychology       |
| Making up something to be more than what it is |

A possible question was formulated for the survey from these inferences. The question would help further clarify the position regarding what constitutes puffery:

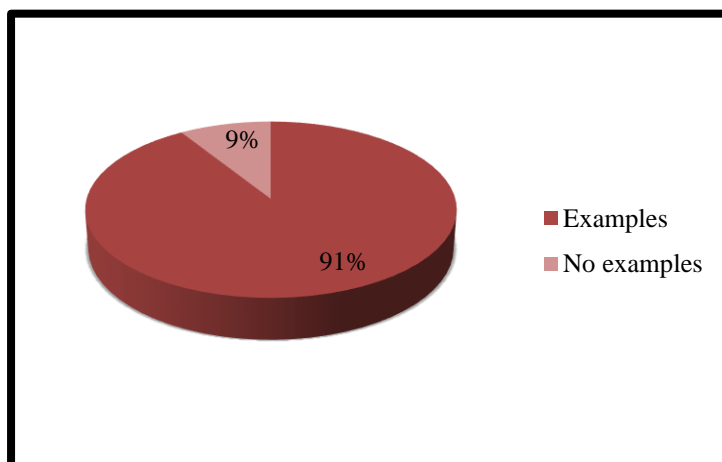
- 1) What is puffery?
  - a) Exaggerations about the product.
  - b) Statements as to the product's capabilities
  - c) Claims of superiority over competitors' products
  - d) Subtle message portrayed by the advert

#### 4.3.2 Focus Group Question Two

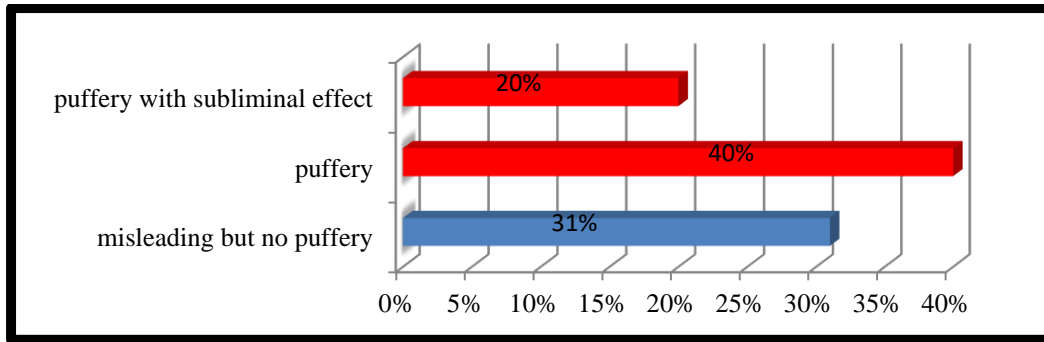
*What are some examples of puffery used in advertisements?*

*Component: Puffery and Consumers*

Sub-heading: Examples



**Figure 4.2a Awareness of Puffery in Advertisements**



**Figure 4.2b Puffery content in Advertising**

91% of the participants came up with an example from a diverse range of products. The products were health and slimming products, energy drinks, airline tickets, holiday accommodation, dental products and online property purchasing. 9% of the participants were not able to provide any examples. Of the 91% of the participants that came up with examples, the following breakdown was observed. 31% gave examples of misleading advertisements that did not necessarily contain puffery. 60% were able to identify the advertisements that utilized puffery. Amongst this 60%, 20% of the participants thought that puffery also included subliminal advertising.

#### *Theme*

Prevalence of puffery in diverse industries

#### *Inference drawn*

Most consumers recognized that puffery was used. One again, there were 31% who appeared to feel that puffery is misleading. Puffery has an influence on purchases in subliminal form as well.

#### Summary of individual comments

|   |
|---|
| Red Bull                                  |
| Protein shakes, slimming products         |
| Online bookings for air travel            |
| Online property hunting                   |
| Dental products                           |
| Skin surgery, age-defying products        |
| Menulog                                   |
| Best sellers on ebay                      |
| Online business ventures for mums at home |
| Hotel bookings and holiday destinations   |

A possible question was formulated for the survey which will determine the extent of puffery usage:

2) In your opinion, which statement best describes usage of puffery in advertisements?

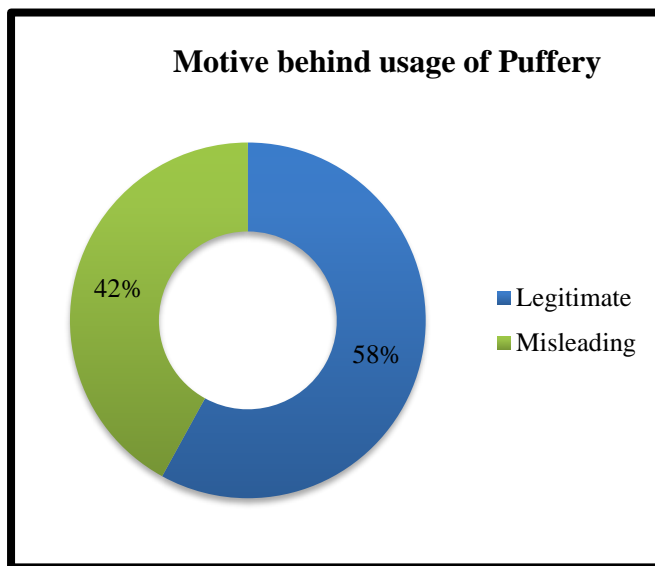
- a) All advertisements have puffery
- b) Most advertisements have puffery
- c) Some advertisements have puffery
- d) Advertisements do not have puffery

#### **4.3.3 Focus Group Question Three**

*Why do you think puffery is used?*

*Component: Promotions*

Sub-heading: Usage of puffery



**Figure 4.3: Motive behind usage of puffery**

For this question, 58% of the participants felt that puffery was used for a legitimate purpose of marketing which included differentiating their products, capturing the market, staying competitive, channelling traffic to their company, and catching the attention of consumers. 42% of the responses, however, noted that puffery was used negatively with the motive of playing on consumers' weaknesses and catching the attention of consumers who may not know too much about products advertised. This was an interesting finding, as it strengthens the idea that puffery does have a strong influencing effect on purchases, and not always in a positive way.

### *Theme*

Profit motive at the expense of ethical considerations.

### *Inference drawn*

Consumers recognize the motive behind puffery. This includes both positive and negative aspects of puffery usage.

Summary of individual comments

|  |
|--|
| Need to sell their products                                |
| Stay competitive, stay in the market                       |
| Playing with the weakness of consumer                      |
| Hook the customer in                                       |
| Catch the attention of consumers who may not know too much |
| Need to capture the consumers                              |
| Make more profits  |
| To differentiate their product                             |
| Playing on people's weakness –emotional impact             |
| Channel traffic to their company                           |
| Stand out from the rest                                    |

A possible question was formulated for the survey which will help determine the extent of puffery usage:

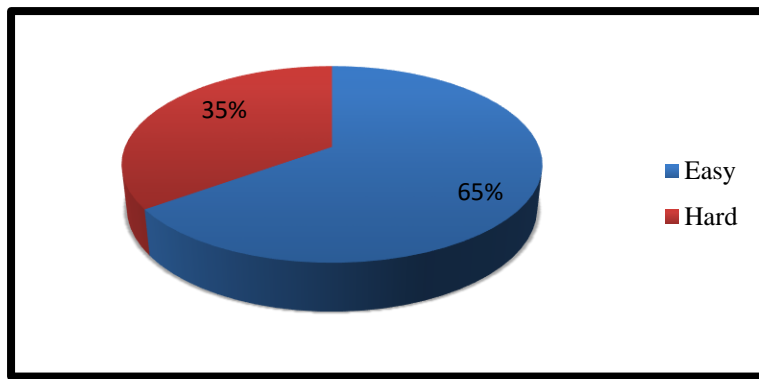
- 3) Why do marketers use puffery?
- a) To help promote their products
  - b) To make their products seem more attractive
  - c) To capture consumers
  - d) To differentiate their product

#### **4.3.4 Focus Group Question Four**

***How does the consumer become aware of puffery in an online setting?***

*Component: Puffery, Consumers and Online transactions*

Sub-heading: Identification



**Figure 4.4 Identifying puffery in an advertisement**

65% of the responses indicated that there were various means by which a consumer could find out about puffery. These means included reviews of products, past purchase experience, flagged products, buyers' confidence ratings, comparing the market websites, research via the Internet, checking usage terms, and checking with others. 35% stated that puffery was only clearly identified after one had been victim to it, and that the reason for this was because the exaggerations made were not so hyped up as to appear unbelievable. This was also because of the lack of ability to verify authenticity given the short time frame within which decisions had to be made in purchases such as these.

#### *Theme*

Safeguards for the Consumer

#### *Inference drawn*

Consumers can verify claims made by advertisers. Identification of puffery is not always before the purchase is completed.

#### Summary of individual comments

|  |
|--|
| Wordings used                                |
| Reviews of products                          |
| From past experience                         |
| Checking the usage terms                     |
| Flagged products                             |
| E-bay feedback –buyer confidence ratings     |
| Voting on products                           |
| Ask others-word of mouth                     |
| Google                                       |
| Compare market websites, Whatif, tripadvisor |



Possible questions were formulated for the survey to determine the possibility of identification and verification of puffery claims:

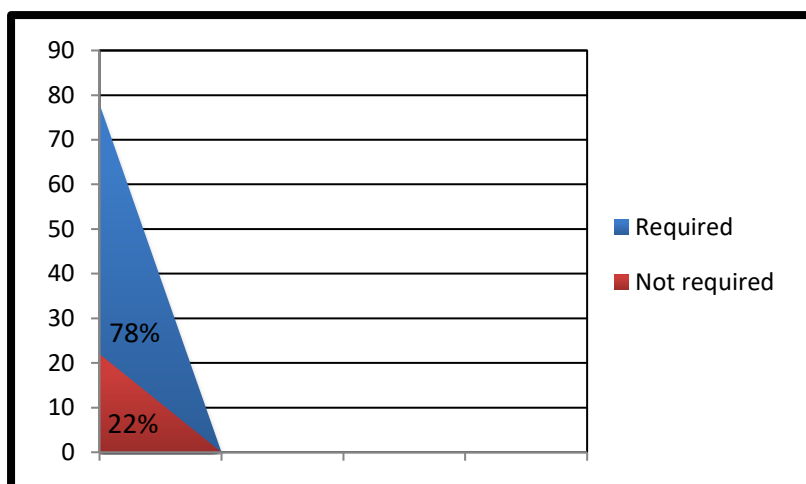
4. How do you determine when puffery has been used?
  - a) Based on what is said, it is clear that it is an exaggeration.
  - b) It is usually used in advertisements so one should not believe claims made.
  - c) By taking steps to verify authenticity
  - d) Based on previous history of usage of it by the company selling the product
  
5. Which of the following do you use to verify claims made?
  - a) Checking with friends and/or family
  - b) Buyer confidence ratings
  - c) Google it to get more information
  - d) Reviews by other purchasers
  - e) A few or all of the above
  - f) None of the above
  
6. Where do you get your knowledge about the products you purchase online from?
  - a) Online media
  - b) Other media – newspaper, journals, books.
  - c) From family members or friends
  - d) From promoters of the product

#### ***4.3.5 Focus Group Question Five***

***How much is a customer expected to know about the products they are purchasing?***

*Component: Puffery, Consumers and Online transactions*

Sub-heading: Awareness



**Figure 4.5 Need for prior knowledge of product before purchase**

78% of the participants indicated that the consumer needed to have a high level of understanding to be able to distinguish between a puffery and a misleading claim. They felt that prior knowledge of the products was a prerequisite. 22% of the participants felt that consumers could shop without any prior knowledge of the product, as they could easily gather more knowledge online before making purchases.

#### *Theme*

Literacy level

#### *Inference drawn*

Consumers needed to have good product knowledge in order to discern puffery from misleading conduct.

#### Summary of individual comments

|   |
|---|
| Level of understanding needs to be high                           |
| Need to know something about product so as not to be misled by ad |

A preliminary question was formulated for the survey which will help determine the need for prior knowledge on the part of the purchaser to avoid being misled:

7. On a scale of 1 to 5, do you think it is important for a consumer to have prior knowledge about the products they are going to purchase online?

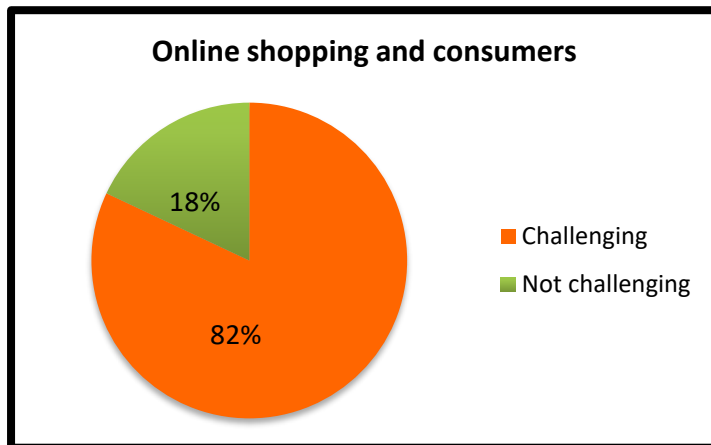
- (a) 1                      (b) 2                      (c) 3                      (d) 4                      (e) 5

#### 4.3.6 Focus Group Question Six

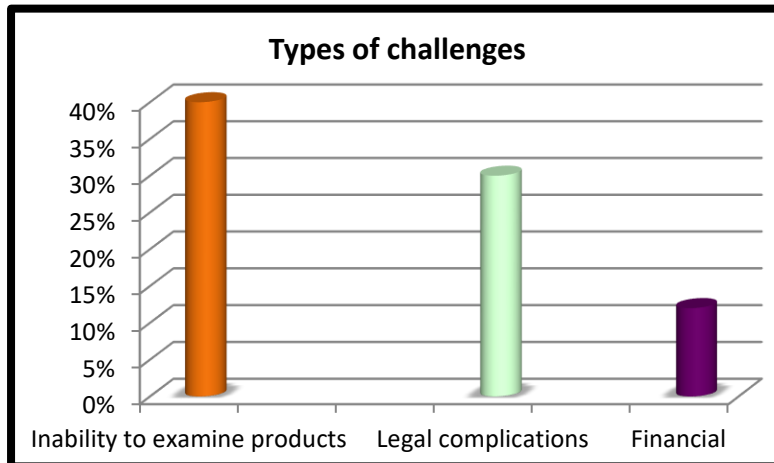
*Do you think online shopping poses challenges to consumers? If yes, what are these challenges?*

*Component: Online transactions*

Sub-heading: Challenges



**Figure 4.6a Online shopping and consumers**



**Figure 4.6b Types of challenges**

82% of the responses indicated that online shopping did pose challenges to consumers, and this came in the form of an inability to verify authenticity as there was an inability to examine products. It was also felt that online shopping was an indirect process, and thus there could be resulting quality control issues. Refunds could take time, and replacements could incur additional charges for shipping or postage. Security of transactions was another factor making

online shopping challenging. The fact that there were global market implications meant that there may be difficulties in obtaining remedies. It was felt that laws governing transactions may very well be outside the jurisdiction of Australian law. This made online purchasing challenging in the event that a remedy was sought.

Of this 82%, the following breakdown was noted. 40% felt that an inability to examine products resulted in goods being delivered that were different to what they had expected. 30% were worried about the legal implications of those transactions and difficulties that may be faced in obtaining remedies. 12% felt that the sheer accessibility of this type of shopping could lead to people being addicted to online shopping, and that it played with people's vulnerabilities. 18% did not feel that it was very challenging to shop online, as they had not yet encountered problems.

### *Themes*

Unmet expectations, security issues

### *Inference drawn*

Online purchasing poses challenges to consumers not encountered in the brick and mortar space.

### Summary of individual comments

|  |
|--|
| Ads can be misleading  |
| What is seen and what is sent out may be different. Not knowing what you are getting |
| Returns are difficult  |
| Plays on people's vulnerabilities because it is so accessible                        |
| Cannot contact the sellers in some circumstances                                     |
| Cannot see the products, sizes or try them   |
| It is an indirect process  |
| Regulatory bodies may be overseas and do not follow Australian rules                 |
| There are issues about security of the transactions                                  |
| Difficulty in getting remedies   |
| Refunds take time and you have to contact so many people to get back your money      |
| No point of face-to face contact in case you have any issues                         |
| Mental challenge of temptation   |
| Financial challenge if you're addicted to buying online                              |
| Global market  |

|   |
|---|
| Quality control issues                                    |
| Missing interaction of physical touch and feel of product |

Possible questions were formulated from these responses to be used in the survey. These questions will confirm whether online shopping is more challenging than shopping in the brick and mortar space:

8. On a scale of 1 to 5, how challenging is online purchasing to you?

(a) 1                      (b) 2                      (c) 3                      (d) 4                      (e)

9. If it does pose a considerable challenge, which of the following may be the reason?

- a) Cannot verify authenticity of the product
- b) The prevalence of pop-ups that can be distracting
- c) The seller is not seen and hard to contact
- d) Not very comfortable to disclose financial details
- e) Some or all of the above

#### 4.3.7 Focus Group Question Seven

*Have you been misled by any advertisements online? If yes, did you get a remedy?*

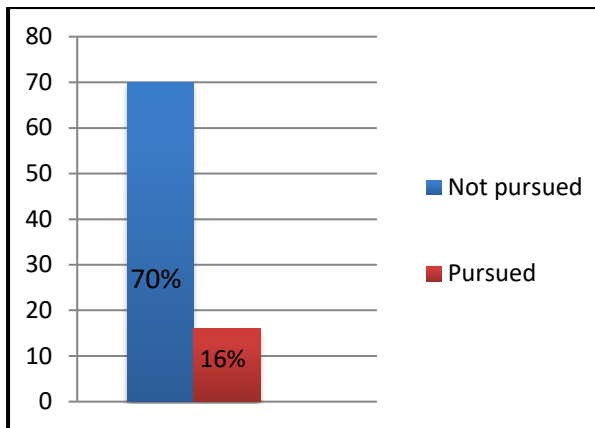
*Component: Consumer, Statutes and Case Law*

Sub-heading: Experience

Consumers and remedies



**Figure 4.7a Consumers misled while shopping online**



**Figure 4.7b Consumers and remedies**

86% of the participants indicated that they had been misled before, and the examples they gave included the following list of purchases that were made after viewing advertisements about the products online. The products ranged across clothes, health products, airline tickets, Foxtel packages, holiday accommodation, mobile phone plans, vacuum cleaners, cricket bats, and dental products. The following breakdown was also noted from this group of participants. 65% felt they were misled because there was no opportunity to examine the products. 21% felt they were misled because terms of the contracts were not easy to understand, and there were a lot of distractions created by pop-ups.

Out of the 86% that had been misled, 70% said they had not bothered to pursue a remedy because of time and cost of getting a replacement. 16% said they had obtained refunds from the bodies handling payments such as PayPal.

14% of the participants stated that they had not been misled yet did agree that this was because they had done extensive checks before making purchases online.

#### *Theme*

Misleading practices.

#### *Inference drawn*

Consumers have been misled by online advertisements containing puffery.

#### Summary of individual comments

|  |
|--|
| Clothes purchase –wrong sizes                          |
| Automated messages for phone deals, mobile phone plans |
| Bat that was not genuine.                              |

|   |
|---|
| Protein shakes did not give muscles   |
| Vacuum cleaner ads  |
| Flipkart –not delivered on time and too late to be returned                       |
| Airline ticket purchases –cost more than actually advertised                      |
| Dental products   |
| Holiday accommodation –use of less vacancy to make customers to hasten their book |
| Foxtel-Foxplay-cost more after adding on necessary packages                       |

The following preliminary survey questions were formulated from these responses to draw further conclusions about consumers being misled by online advertisements:

10. Have you been misled by online advertisements before?

- a) Yes
- b) No

If the answer to Question 10 was (a) Yes, answer Questions 11-14.

11. Where did you find the misleading advertisement/s?

- a) From a search engine – for example Yahoo, Google etc.
- b) Social Media website –for example Facebook, Twitter etc.
- c) YouTube
- d) All or a combination of the above answers

12. On a scale of 1 to 5, how would you rate puffery as the cause for you being misled?

- (a) 1                      (b) 2                      (c) 3                      (d) 4                      (e) 5

13. If the answer to Question 10 is (a), did the puffery used

- a) Convince you that the claims made were true
- b) Confuse you as to what was true and what was not
- c) Seem not believable but nonetheless made the product more appealing
- d) Raise a hope in you that it would be true

14. You were misled by the online advertisement because

- a) You did not know much about the product and could not verify authenticity
- b) The advertisement was confusing

- c) Of the speed in which you had to make decisions regarding purchase of the product
- d) You were distracted by pop ups
- e) None of the above

If your answer to Question 10 was (b) No, answer Questions 15-16

15. You were never misled by online advertisements because

- a) You understood the difference between puffery and what could be misleading.
- b) You verified the authenticity of the claims before making a purchase.
- c) The advertisements online are not misleading.
- d) You knew a lot about the product you were purchasing.

16. Where did you learn about puffery?

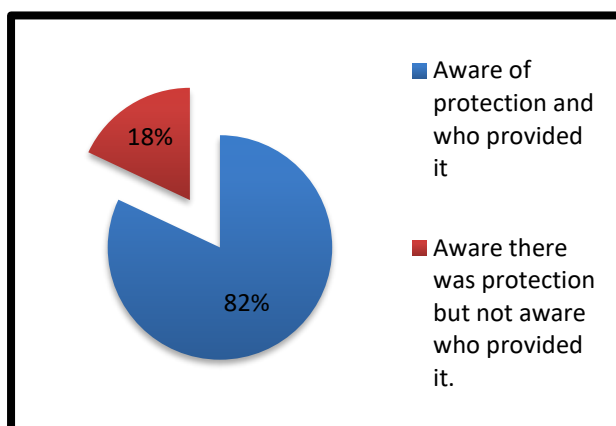
- a) I studied as part of a course I undertook.
- b) I read about it from a media source
- c) Someone told me

#### 4.3.8 Focus Group Question Eight

*What protection are you given against misleading advertisements, and is this protection sufficient?*

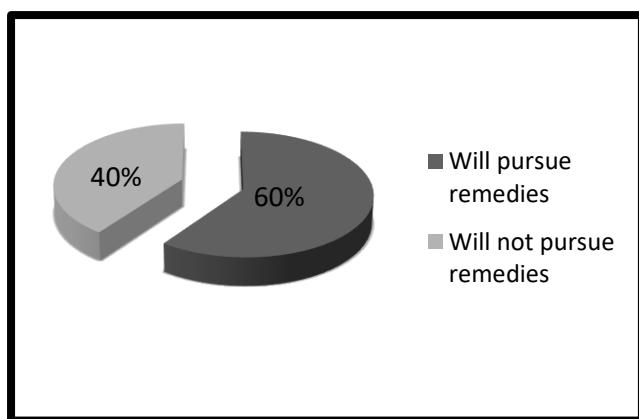
*Component: Statutes and case laws, and Regulatory Bodies*

Sub-heading: Protection



**Figure 4.8a Awareness of protection against misleading advertisements**





**Figure 4.8b Willingness to pursue remedies**

The following breakdowns were observed. 82% of the participants were able to identify one or more the following bodies as providers of protection against misleading practices: Consumer Affairs Victoria, ACCC, Ombudsman, and Terms of the Contract. 18% knew that protection was available but were not very certain as to which body would be addressing problems if they arose. With regard to how well-informed consumers are about the protections they have, 74% of the participants felt that consumers had good knowledge about this matter but 26% felt that there were many who were not aware as to what protection was available.

60% of participants felt that remedies available would be pursued by those who were misled, while 40% felt that many consumers would not bother because of difficulties, cost and time delays that were prevalent in this type of shopping. They felt that, since it has become a borderless world, many consumers would find it difficult to take advantage of any protection and remedy that was available because there would be jurisdictional issues.

#### *Theme*

#### *Rights*

#### *Inference drawn*

Consumers are aware that there is protection but they may not know where this protection lies or take advantage of that protection.

#### Summary of individual comments

|   |
|---|
| Consumer affairs                                      |
| There is protection but not everyone knows about this |
| Ombudsman   |
| ACCC  |

|  |
|--|
| Borderless world –out-of jurisdiction issues can prevent remedies being obtained |
| Terms of the contract –returns and refund policy.                                |
| Online terms and conditions are so complicated.                                  |
| Paypal   |

The following preliminary survey questions were formulated from these responses. These questions will help determine consumers' perceptions about the availability of remedies for consumers misled by puffery in online advertisements.

17. Do you have any remedy if you are misled by puffery in an online advertisement?

- a) Yes
- b) No
- c) Yes in certain circumstances only

Please specify .....

18. What is the avenue open to you if you have been misled by an online advertisement?

- a) Bring an action in court
- b) Report the matter to the Consumer Affairs Victoria or the Australian Competition and Consumer Council
- c) Lodge a Complaint with the Advertising Standards Board
- d) All of the above

19. On a scale of 1 to 5, how difficult is it to obtain a remedy?

- (a) 1                      (b) 2                      (c) 3                      (d) 4                      (e) 5

20. If it is difficult to obtain a remedy, which of the following may be a reason/s for it being difficult?

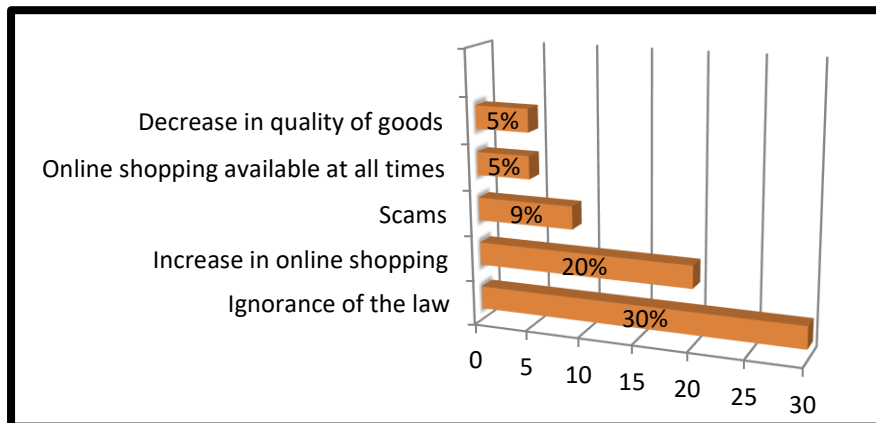
- a) Cost
- b) It may be time consuming
- c) The law that governs the contract may be the law of the seller's country and it may not be favourable to your case
- d) There may difficulties in proving your case
- e) All of the above

#### 4.3.9 Focus Group Question Nine

*Do you think misleading practices by marketers and advertisers is a problem in Australia? If yes, how big a problem do you think it is?*

*Component: Promotions and Regulatory Bodies*

Sub-heading: Problem identification



**Figure 4.9 Reasons why misleading practices by marketers may be a big problem**

69% of the participants did feel that misleading practices by marketers is a big problem in Australia. They felt that it was a problem that was only going to keep on growing if steps were not taken to curb it. The participants who made up this 69% can be broken down in the following manner. 30% felt that people who fell into age group of 20-30 years were not as aware of laws and thus could be easily misled. This was alarming, because the people who were in this age group represent the largest number of people who shop online. 20% felt that it was a big problem and a growing one because the number of people shopping online was growing exponentially. 9% felt that there was evidence of many people being scammed in Australia. 5% felt that online shopping is available 365 days and 24/7 and thus more people could get online and may be misled. 5% felt that quality of products would decrease over time. 31% of the participants felt that it was not a big problem yet, as Australia had sufficient laws that were keeping things under control. They felt that there were sufficient avenues provided for a person who has been misled to get their money back.

*Theme*

Need for Law to keep up with trends in marketing

Misleading practices is a growing problem.

### Summary of individual comments

|  |
|--|
| It is an emerging concern. Younger people (target market) not aware of their rights                        |
| It is a problem as more people are shopping online – spending up to 80% of their income                    |
| Not really in Australia as it is still a new market (online)   |
| Yes because online shopping is open 365 days and 24/7  |
| Yes will lead in decline in quality of products in the market over time                                    |
| We have enough rights to protect us and the fact I have not exercised them yet tells me it is not an issue |
| No, because there are guidelines and ways to get our money back  |
| Online shopping is growing and problems will become a bigger concern. It should be tackled soon            |
| Yes, a lot of people are being scammed   |

The following preliminary survey questions were formulated from these responses. These questions will shed light on whether misleading advertisements could have a larger damaging effect if left unaddressed:

21. On a scale of 1 to 5, how serious do you think the problem of misleading advertisements is?

1            (b) 2            (c) 3            (d) 4            (e) 5

22. On a scale of 1 to 5, what is the possibility that this problem will grow?

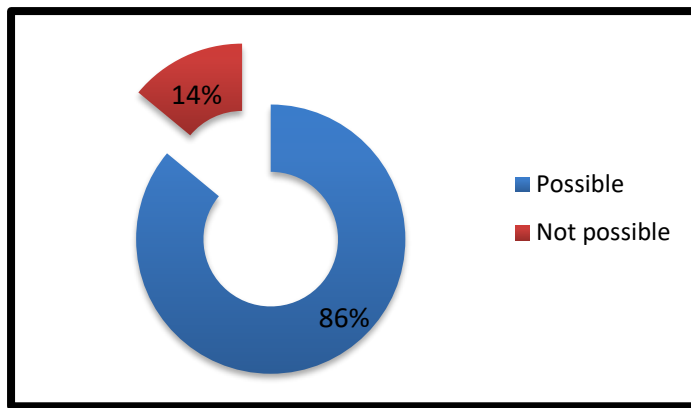
1            (b) 2            (c) 3            (d) 4            (e) 5

#### ***4.3.10 Focus Group Question Ten***

***Are there any alternatives marketers can pursue rather than usage of puffery?***

*Component: Promotions*

Sub-heading: Alternatives to puffery



**Figure 4.10 Possibility of marketing without usage of puffery**

86% of the participants felt that there were alternatives that can be pursued. The following are their suggestions for alternatives that can be pursued. The first alternative was to get government approval for products. This can take the form of ticks of approval or seals to guarantee compliance with established standards. The second alternative suggested was to have accreditation granted by governing bodies for marketing processes used by companies. The third alternative identified was to have marketers work alongside legal teams to prevent opportunities for misleading practices. The next alternative was to get companies to have testimonials for their products. Another interesting alternative was for companies to highlight the strengths of the product that are true instead of exaggerating the product's capabilities. 14% felt that it would be very difficult to market products without some form of puffery being used. They felt that it was a creative licence granted to advertisers to make their products appealing, and that advertisements would not be very attractive without it.

#### *Theme*

Ethical considerations

#### *Inference drawn*

Marketing can be more truthful

#### Summary of individual comments

|  |
|--|
| Have marketers work alongside legal team   |
| Online ads to be backed by facts   |
| Have external body endorse your company  |
| Change focus by showing their product in the best light within reasonable limits |

|   |
|---|
| Share information with consumers to gain trust        |
| Have testimonials                                     |
| Celebrity sponsors                                    |
| Disclaimers, picture evidence                         |
| Trials  |
| Be upfront when mistakes are made                     |
| Subject company to an audit by an independent company |
| Company accreditation -tick                           |
| Focus on products that are more healthy               |
| Government approved                                   |
| Contact details for support, help                     |

The following preliminary survey question was formulated from these responses to help answer the question whether marketing could be carried without puffery usage:

23. Is it possible for marketers to promote their products successfully without the usage of puffery?

- (a) Yes
- (b) No

#### **4.4 Analysis of Findings**

The findings of the focus group sessions were analysed according to the components under which they were categorized. Questions have been grouped accordingly to form a logical flow of understanding. Inferences were drawn from the data gathered. The analysis is presented next.

##### ***4.4.1 Component: Puffery***

###### ***4.4.1.1 Focus Group Question One***

###### ***What is your understanding of puffery used in advertisements?***

With regard to consumers' understanding of what is puffery, the responses gathered indicate that 86% had an understanding of it. From this 86%, 30% thought it was misrepresentation. The inference that is drawn from this by the researcher is that there was potential for consumers to be misled, as there were at least 44% of participants who were not able to distinguish between puffery and misleading practice.

#### *4.4.1.2 Focus Group Question Two*

##### ***What are some examples of puffery used in advertisements?***

As to the question whether consumers would recognise puffery if they saw it in an advertisement, 60% said they would, 9% said they would not, and 31% said they were uncertain whether they would be able to recognise it as puffery. This raises the inference that the boundary lines between puffery and misleading practice were not clear. Consumers can mistake puffery as being true statements.

#### *4.4.1.3 Focus Group Question Four*

##### ***How does the consumer become aware of puffery in an online setting?***

Lastly, for the responses gathered to the question whether there were sufficient aids for verification of puffery in an online setting, 65% said there were, while 35% said there were not. The two reasons supplied as to why puffery was not verifiable were because it was not clear that puffery was being used and the lack of time for verification when purchases were made over the Internet. The inference drawn was that consumer investigation was essential before purchase in order to be able to discern the truth from puffery.

An overall conclusion that was gathered from these three questions is that puffery is not always easily identifiable by consumers. Thus, there was potential for it to be misleading. The online setting for purchases could also pose a problem for verification of the truth of an advertisement. The lines between puffery and misleading conduct were not always clear.

#### ***4.4.2 Component: Online transactions***

##### *4.4.2.1 Focus Group Question Six*

##### ***Do you think online shopping poses challenges to consumers? If yes, what are these challenges?***

The answers to this question indicate that 82% felt that online purchasing was challenging. The challenges presented themselves in the form of an inability to examine products (40%), difficulty in obtaining legal recourse (30%), and that it played with people's vulnerabilities (12%). The inference that is drawn by the researcher from this is that consumers did not have equal bargaining strength with sellers and advertisers. The consumers could be misled due to this inequality. The presence of puffery could make this more challenging for consumers. 18%

of consumers did not feel that it was very challenging to shop online, and they attributed this to the fact that they had not yet encountered any problems. This was due to the fact that they did ample verification prior to purchase. In other cases, there was no misleading conduct or puffery involved. The clear message was that more than 80% of participants felt that online shopping was more challenging than purchasing in the brick-and-mortar space.

#### ***4.4.3 Component: Consumer***

##### ***4.4.3.1 Focus Group Question Five***

###### ***How much is a customer expected to know about the products they are purchasing?***

The majority of the participants (78%) indicated that the consumer needed prior knowledge of products prior to purchase to avoid being misled. They also felt that distinguishing between puffery and a misleading claim was not that easy. 22% of the participants felt that consumers did not need prior knowledge, as they could gather more knowledge online before making purchases. In both cases, verification was a requisite. The inference made is that it was easy to be misled. The implication of this is that there was a higher chance of being misled online. Puffery could only be easily identified if there was good prior knowledge about a product or if reasonable checks were made prior to purchase.

##### ***4.4.3.2 Focus Group Question Seven***

###### ***Have you been misled by any advertisements online? If yes, did you get a remedy?***

The high number of participants that were misled by online advertisements (86%) is a clear affirmation that online purchasing is challenging. Even the 14% that were not misled attributed this to the fact of extensive checking being done before purchase. It also indicates that there are quite a number of misleading advertisements online. The consumers' inability to discern truth from a lie or exaggeration is clearly demonstrated by responses to this question. The large proportion of participants who also did not pursue remedies (70%) indicated that consumers were taking risks with purchases. Security of successful purchases was low. The availability of remedies was offset by the difficulties posed to consumers in obtaining them.

##### ***4.4.3.3 Focus Group Question Nine:***



***Do you think misleading practices by marketers and advertisers is a problem in Australia? If yes, how big a problem do you think it is?***

69% of responses indicated that misleading practices by marketers is a big problem in Australia. The participants did not attribute this solely to the usage of puffery in advertisements. The responses to the earlier questions discussed above, however, show that puffery could have played a part, as the lines between puffery and misleading practices were not clearly perceived by consumers. The indication by consumers that puffery was not so easily recognised further confounds the matter. The recognition by 20% of participants that this problem would only grow was based on the increasing migration of purchasers to the online sphere. It was felt that the problem of misleading advertisements would contribute to drops in quality of products sold as well. The need for stronger measures was revealed to be a common sentiment amongst the larger portion of the participants.

***4.4.4 Components: Statutes, and Case laws and Regulatory Bodies***

***4.4.4.1 Focus Group Question Eight:***

***What protection are you given against misleading advertisements and is this protection sufficient?***

All participants were aware that there was some form of protection against misleading advertisements. 18%, however, did not know which body addressed the issue of misleading practices. The majority (76%) also felt that consumers in general had good knowledge of the matter of misleading advertisements and the regulatory bodies that addressed it. This indicates that the regulatory bodies had made sufficient effort at regulating the area of misleading advertisements. It also showed that knowledge of these matters was disseminated adequately to the public. There were 40% who also felt that the protection was present but that obtaining remedies was not necessarily practical or as easily accessible as expected. This raised the inference that remedies are not so easily obtained. This hints at the fact that a possible review of the extent of protection is necessary.

***4.4.5 Component: Promotions***

***4.4.5.1 Focus Group Question Three***

***Why do you think puffery is used?***

58% of the participants felt that puffery was used in a positive way. 48% felt that it was used to take advantage of consumers' lack of knowledge and vulnerabilities. This echoes some of the findings from the secondary data research. The inference drawn is that consumers recognize both the positive and negative aspects of puffery usage. The results appear to imply that puffery usage was not necessarily in order to achieve an ethical outcome. It also highlights the influential power of puffery.

#### *4.4.5.2 Focus Group Question Ten*

##### ***Are there any alternatives marketers can pursue rather than usage of puffery?***

A large portion of participants (86%) felt that there were alternatives to puffery usage. This raises the inference that marketing can be more truthful. The many alternatives suggested by the participants indicate that consumers appreciated honesty in advertising. They also felt that alternatives such as government approvals and accreditation by governing bodies would make verification of the truth in an online advertisement a much easier and safer task. 14% felt that it was difficult to promote products without some form of puffery. This conclusion highlights the continued need for freedom in exercising marketing creativity.

The findings have helped determine consumers' perceptions about puffery and whether they are easily identifiable. The knowledge of the consumer and ability to discern fact from fiction in an online setting have provided important feedback as to whether it is still possible to uphold the concept of caveat emptor, the basis on which puffery stands.

The findings help to answer the subsidiary questions of this project:

1. *What is the nature and extent of puffery regulation in online advertisements?*
2. *How effective is the regulation of puffery in online advertisements?*

They also help to confirm the challenges posed by online purchasers, as stated in previous research. Challenges are prevalent, and there are new difficulties that are being posed as technology advances at a rapid rate.

## **4.5 Refining Questions for Survey**

Inferences were drawn from the above findings, and these were then used as a template for forming and refining questions for the quantitative part of this research, the survey. The next

necessary step taken was drawing up of a Questionnaire Matrix. The Questionnaire Matrix illustrates the process by which the questions were then refined for the survey. It summarizes the whole process from secondary data research, through the focus group sessions, to the finalized questions for the survey. The Questionnaire Matrix is shown in Table 4.1, and an explanation follows the table.

### Table 4.1 Questionnaire Matrix

| <p><b>Research objective:</b> To determine whether there needs to be tighter regulation with regard to the usage of puffery in online advertisements.</p> <p><b>Test:</b> Focus groups<br/>Survey Questionnaire</p> |   |   |   |   |   |
|---|---|---|---|---|---|
| Research Background   | Literature Review   | Proposition                                     | Focus group Questions   | Inferences Drawn  | Survey Questions  |
| Puffery in advertisements   | <p>Olshavsky &amp; Miller (1972), Anderson (1973), Olson &amp; Dover (1978), Oliver (1979), Kamins (1985)</p> <p>Cunningham &amp; Cunningham (1977), Olson &amp; Dover (1978)</p> <p>Rotfeld &amp; Rotzoll (1980), Rotfeld &amp; Preston (1981)</p> <p>Kamins &amp; Marks (1987), Wyckham (1987), Oliver (1979)</p> <p>Vanden Bergh &amp; Reid (1979), Kamins &amp; Marks (1987)</p> <p>Richards (1990), Preston (1996)</p> <p>Cacioppo &amp; Petty (1989), Garcia-Marques &amp; Mackie (2001)</p> <p>Haan &amp; Berkey (2002)</p> <p>Cowley (2006)</p> <p>Campbell &amp; Wright (2008)</p> <p>Toncar &amp; Fetscherin (2012)</p> | <b>P3 - Consumers lack knowledge of puffery</b> | <p>1. What is your understanding of puffery used in advertisements?</p> <p>2. What are some examples of puffery used in advertisements?</p> <p>3. How does the consumer become aware of puffery in an online setting?</p> | <p>Potential for being misled</p> <p>Boundary lines not clear</p> <p>Consumer investigation essential before purchase</p> | <p>3. What is puffery?</p> <p>4. What is the frequency of usage of puffery in online advertisements?</p> <p>5. How do you determine that puffery has been used?</p> <p>11. Where can misleading online advertisements be found?</p> <p>6. How frequently do you use the following sources to verify claims made in online advertisements?</p> |

| Research Question  | Literature Review   | Proposition  | Focus group Questions  | Inferences Drawn   | Survey Questions   |
|--|---|--|--|--|--|
| 1) Is the current regulation of puffery in online advertisements adequate? | <p>Policy objectives of the Competition and Consumer Act 2010-An Australian Consumer Law -Fair markets - Confident Consumers (2009)</p> <p>Sections 18 and 29 Australian Consumer Law – Guide to Provisions (2010)</p> <p>The Australian Broadcasting Corporation Act (1983)</p> <p>Therapeutic Goods Code</p> <p>The Alcoholic Beverages Advertising Code</p> <p>Weight Management Industry Code</p> <p>Advertising Code and Administrative Boards (Kerr &amp; Moran (2002)</p> <p>Taco Company of Australia Inc. v Taco Bell Pty Ltd (1982)</p> <p>Parkdale Custom Built Furniture Pty Ltd v Puxu Ltd (1982)</p> <p>General Newspaper Pty Ltd vs. Telstra Corporation (1993)</p> <p>Campomar Sociedad, Limitada v Nike International Ltd (2000)</p> <p>ACCC v Target Australia Pty Ltd (2001)</p> <p>Gillette Australia Pty Ltd v Energizer Australia Pty Ltd (2002)</p> <p>ACCC v Cadbury Schweppes Pty Ltd (2004)</p> <p>Bembridge v Just Spectacles Pty Ltd [2006]</p> <p>eBay International AG v Creative Festival Entertainment Pty Ltd (2006)</p> <p>ACCC V Telstra Corporation (2007), Alami v Langov &amp; Ors (2008)</p> <p>ACCC v Global One Mobile Entertainment Ltd (2011)</p> <p>ACCC v C I &amp; Co Pty Ltd (2010), ACCC v Singtel Optus Pty Ltd (No 4) (2011)</p> <p>Swisse Vitamins Pty Ltd v The Complaints Resolution Panel (2012]</p> <p>Consumer Affairs Victoria v Hair Science International Pty Ltd (2013)</p> <p>Historical beginnings of Puffery - Browne M, Hale K &amp; Cosgrove M (2012)</p> <p>Trade Practices Act 1974 and Electronic transactions - Smith (2000)</p> | <b>P1 - There is ambiguity as to the extent of regulation.</b> | <p>5. How much is a customer expected to know about the products they are purchasing?</p> <p>6. Do you think online shopping poses challenges to consumers? If yes, what are these challenges?</p> | <p>Easy to be misled</p> <p>Online purchasing is challenging</p> | <p>10. To what extent is it important for a consumer to have the following categories of knowledge about the products they are going to purchase online?</p> <p>8. Describe the accuracy of the following statements with regards to your own experience with online purchasing.</p> <p>9. If online purchasing poses a considerable challenge, which of the following may be the reason for it?</p> |

| Research Question  | Literature Review   | Proposition   | Focus group Questions   | Inferences Drawn             | Survey Questions  |
|--|---|---|---|------------------------------|---|
| 2. What is the nature and extent of puffery regulation in online advertisements? | <p>Enforcement actions taken by ACCC - ACCC &amp; AER annual report 2012-13 and ACCC &amp; AER annual report 2013-14.</p> <p>Trademarks that can mislead consumers (Meadley, 2012)</p> <p>Misleading practice in beverage industry Fehrenbach (2008)</p> <p>Red Bull out of court settlement - Australian Food News, (October 2014)</p> <p>Misleading action in health industry - Swisse Vitamins Pty Ltd v The Complaints Resolution Panel (2012), (Nettleton, (2012)</p> <p>Misleading action in Optical industry - Specsavers Pty Ltd v Luxottica Retail Australia Pty Ltd [2013] FCA 648, (Norgard &amp; Dang, (2013)</p> <p>Actions taken by Consumer Affairs Victoria - Consumer Affairs Victoria, Annual Report (2013-2014).</p> <p>Problems associated with the ASR - Harker, Harker, &amp; Volkov (2001)</p> <p>Self-regulatory system used in advertising in Australia -Baker, Graham &amp; Harker (1998)</p> <p>General Theory of effective regulation– Normative Coherence - Sheehy B &amp; Feaver D (2011)</p> <p>General Theory of effective regulation – Positive Coherence Feaver D &amp; Sheehy B (2011).</p> <p>Puffery outlawed in Mexico - Trujillo, (2007)</p> | <b>P2- Enforcement is instituted on a reactive basis.</b> | 8. What protection are you given against misleading advertisements and is this protection sufficient? | Remedies not easily obtained | <p>13. Have you ever managed to get a remedy for being misled by an online advertisement?</p> <p>21. What is the avenue open to you if you have been misled by an online advertisement?</p> |



An explanation of the process employed in Table 4.1 is now provided. The first step was to formulate and refine questions that would cover the area of puffery in advertisements. The literature reviewed for this purpose provided the following findings.

Olshavsky and Miller (1972;), Anderson (1973), Olson and Dover (1978), Oliver (1979) and Kamins (1985) found that verbal puffery influenced post-trial product evaluations. Cunningham and Cunningham (1977), Olson and Dover (1978), Rotfeld and Rotzoll (1980) and Rotfeld and Preston (1981) found that a substantial number of consumers believed puffery. Kamins and Marks (1987), Wyckham (1987) and Oliver (1979) found that verbal puffery influences pre-purchases. Vanden Bergh and Reid (1979) concluded that exaggerated claims can produce negative effects. Kamins and Marks (1987) found that puffery has an effect on product attitude and purchase intentions.

Richards (1990) and Preston (1996) concluded that puffery has an effect on product attitude and purchase intentions. Cacioppo and Petty (1989) found that puffery can constitute deceptive advertising. Garcia-Marques and Mackie (2001) discovered that repeated messages have an influential effect. Haan and Berkey (2002) concluded that advertisers use puffery because it works. Cowley (2006) found that evaluation of the brand was more positive when puffery claims were used. Campbell and Wright (2008) state that, the larger the exposure to an online ad, the more positive the attitude towards the ad. Toncar and Fetscherin (2012) found that puffery can also be represented via visual metaphors.

The proposition that was developed from these findings is that consumers lack knowledge of puffery (the full details of Proposition Development were discussed in Chapter 2).

The Focus Group questions that were designed to test this proposition were:

1. What is your understanding of puffery used in advertisements?
2. What are some examples of puffery used in advertisements?
4. How does the consumer become aware of puffery in an online setting?

The inference drawn from the responses to Focus Group Question 1 is that there was a potential for consumers being misled.

The Survey Questions that were then finalized to further test the proposition were:

- Q3. What is puffery?
- Q4. What is the frequency of usage of puffery in online advertisements?

The inference drawn from Focus Group Question 2 is that the boundary lines between puffery and misleading conduct were not clear.

The Survey Questions finalized to draw more information on this were:

Q5. How do you determine that puffery has been used?

Q11. Where can misleading online advertisements be found?

The inference drawn from Focus Group Question 4 was that investigation by consumers was essential before purchase.

The Survey Question finalized to draw more information on this was:

Q6. How frequently do you use the following sources to verify claims made in online advertisements?

The next step involved looking at the Research Questions, the literature reviewed, and the Propositions developed from them.

The primary research question for this research is:

***Is the current regulation of puffery in online advertisements adequate?***

A summary list of literature reviewed to develop initial conclusions can be found in Chapter 2, Table 2.2. The proposition that was developed after looking at the above literature is that there is ambiguity as to the extent of regulation.

The Focus Group Questions that were formulated to test this proposition were as follows:

5. How much is a customer expected to know about the products they are purchasing?

6. Do you think online shopping poses challenges to consumers? If yes, what are these challenges?

The inference from the responses to Focus Group Question 5 is that it was easy for a consumer to be misled while purchasing online.

The Survey Question that was then finalized to draw more information on this was:

Q10. To what extent is it important for a consumer to have the following categories of knowledge about the products they are going to purchase online?

The inference drawn from the responses to Focus Group Question 6 is that online purchasing is challenging.



The Survey Questions that were developed to draw more clarity on this are as follows:

Q8. Describe the accuracy of the following statements with regard to your own experience with online purchasing.

Q9. If online purchasing poses a considerable challenge, which of the following may be the reason for it?

The first Secondary Research Question is:

***What is the nature and extent of puffery regulation in online advertisements?***

A summary list of literature reviewed to develop initial conclusions can be found in Chapter 2 under the The proposition that was developed after looking at the above literature is that legal enforcement is instituted on a reactive basis.

The Focus Group Question that was formulated to test this proposition is as follows:

8. What protection are you given against misleading advertisements and is this protection sufficient?

The inference drawn from the responses to this question is that remedies for breaches of the law in relation to puffery and misleading practices not easily obtained.

The Survey Questions finalized to gather more information on this were:

Q13. Have you ever managed to get a remedy for being misled by an online advertisement?

Q21. What is the avenue open to you if you have been misled by an online advertisement?

The second Secondary Research Question is:

***Is the regulation of puffery in online advertisements effective?***

A summary list of literature reviewed to develop initial conclusions can be found in Chapter 2, Table 2.2.

The first proposition that was developed after looking at the above literature is that there is a positive relationship between consumers' dissatisfaction and their avenues for remedies.

The Focus Group Question that was formulated to test this proposition is as follows:

7. Have you been misled by any advertisements online? If yes, did you get a remedy?

The inferences drawn from the responses to Focus Group Question 7 are that consumers are aware of their rights and that fewer consumers were likely to pursue a remedy in the event of being misled in an online purchase.

The Survey Questions finalized to gather more information on this were as follows:

Q12. Have you been misled by online advertisements before?

Q20. Is it possible to obtain a remedy if you are misled by an online advertisement?

Q22. To what extent do you agree with the following statement? It is difficult to obtain a remedy for being misled by puffery in an online purchase?

Q23. If obtaining a remedy poses a certain amount of difficulty, could any of following be a reason for it?

The second proposition developed from the literature reviewed (listed in Chapter 3) was that legal uncertainty as to the boundaries of puffery has led to exploitation by advertisers.

The Focus Group Questions that were developed to test this proposition are as follows:

3. Why do you think puffery is used?

9. Do you think misleading practices by marketers and advertisers is a problem in Australia?

If yes, how big a problem do you think it is?

The inference drawn from the responses to these questions is that advertising and marketing has ethical concerns that need to be addressed.

The Survey Questions that were finalized to gather more information on these questions are as follows:

Q7. Why do marketers use puffery?

Q18. To what extent do you agree with the following statement: Misleading online advertisements are a serious problem?

Q19. What is the possibility of this problem growing?

The other Focus Group Question that was formulated to test the proposition, that legal uncertainty as to the boundaries of puffery has led to exploitation by advertisers, is:

10. Are there any alternatives to usage of puffery that marketers can use?

The inference gathered from the responses to Focus Group Question 10 is that change is viable, as there were alternatives to puffery usage.

The Survey Question that was then finalized to draw more information on this was:

Q24. Is it possible for marketers to promote their products successfully without the usage of puffery?

Other questions to elicit more information on these main questions were also formulated. The full list of questions is presented in Chapter 5. The detailed analysis of the survey, survey questions, and findings are also seen in Chapter 5.

#### **4.6 Scale development process**

The scale development process is carried out in three basic steps (Clark & Watson 1995 and De Vellis 2003). The first step, called item generation, involves the researcher providing theoretical support for the initial item pool (Hutz et al. 2015 cited in Morgado et al. 2017). Inductive or deductive methods, or a combination of the two methods, can be used for item generation. Under deductive methods, literature is reviewed extensively and pre-existing scales are used (Hinkin 1995). For this research, literature was reviewed in line with the three research questions. The questions that were formulated for the Focus groups were developed based on the literature reviewed and hypotheses developed. Table 4.1 Questionnaire Matrix in Chapter 4 provides a summary of how the questions were developed and the literature reviewed.

Kapuscinski and Masters (2010) state that inductive methods base item development on opinions gathered from the target population. In this research, the responses gathered from the focus groups helped to refine the questions and to scale them appropriately for the survey instrument. The process of refining the questions from the focus group session responses has been detailed in Chapter 4, Refining Questions for Survey. Suitable scale instructions, item redaction, variability of responses that are required (De Vellis 2003) were adhered to. Questions were kept simple, clear and scaled appropriately to ensure varied and unbiased responses.

The second step, called theoretical analysis, involves the researcher assessing the content validity of the new scale (Morgado et al. 2017). The researcher has to ensure that the initial item pool reflects the desired construct (Arias et al. 2014 cited in Morgado et.al 2017) The validity of the item content instills confidence in all consequent inferences. To ensure content validity, opinions of expert or target population judges is sought (Morgado et al. 2017).

Nunnally (1967) point out that the researcher is thus able to ensure that the hypothesis in the research represents the construct of interest appropriately. In this research, consumer-based questionnaires were reviewed to determine how questions had to be worded to elicit valid responses from the required target population. Other researchers, who had proven experience in developing survey questions, were also consulted for checking the questions for content validity.

The last step, psychometric analysis, involves an assessment of construct validity and reliability of the new scale. Construct validity relates to what the instrument is actually measuring (Churchill 1979) and how legitimate are the inferences that can be drawn from observed scores to the theoretical constructs (Podsakoff et al. 2013). The assessment of construct validity and reliability carried out for this research has been detailed in Chapter 5 of this research.

#### **4.7 Conclusions**

The focus group sessions represented an important step in this research, for two reasons. They not only provided responses from consumers that helped answer the research questions, but they also provided necessary input to formulate and refine the questions for the next stage of the research, the survey. The responses at this stage indicated that there is a need for tighter regulation and that puffery did have the potential for being misleading. The refined survey questions helped to provide the necessary information to further confirm these initial conclusions. The details of the survey questions, findings and analysis can be found in Chapter 5. Chapter 5 also provides details on the tests employed to verify the reliability of the survey instrument and the results generated from its usage.

## CHAPTER 5: SURVEY FINDINGS AND ANALYSIS

### 5.1 Introduction

The first part of this chapter provides frequency distributions and presents findings based on the responses to the survey questions. The purpose of looking at these descriptive statistics is to throw further light on consumers' perceptions of puffery usage. The findings provide a base upon which a full analysis can be carried out. The next part of the chapter looks at the testing of the survey for reliability and validity of results. Details of the various tests employed to confirm credibility are shown. The two parts of this chapter will not only show that the findings are reliable but also that they are necessary to draw final conclusions for the research questions.

### 5.2 Survey Questions and Responses

The first question for the survey has been omitted from this discussion, as it is a question that seeks consent from participants for their participation.

#### 5.2.1 Question 2

*How many times have you done online shopping before?*

| # | Answer             | Percentage of responses |
|---|--------------------|-------------------------|
| 1 | 1-3 times          | 23.6%                   |
| 2 | 4-7 times          | 18.3%                   |
| 3 | 8-10 times         | 8.1%                    |
| 4 | More than 10 times | 50%                     |

This question provides insight into the frequency of online shopping. The largest number of responses (50%) fell into the category that highlighted the most frequent usage of online shopping for purchasing (more than 10 times). In addition, consumers who had shopped between 4-7 times before drew a sizeable response (18.3%). This is a clear indicator that there is a growing number of consumers who are turning to the online medium for purchases. The frequency of online purchases also indicates that consumers have confidence in using the online medium for making purchases.

### 5.2.2 Question 3

*What is puffery?*

| # | Question  | Strongly agree | Somewhat agree | Neither agree nor disagree | Somewhat disagree | Strongly disagree |
|---|---|----------------|----------------|----------------------------|-------------------|-------------------|
| 1 | Exaggeration/s about the product's characteristics            | 39.7%          | 43.8%          | 10.2%                      | 3.06%             | 3.06%             |
| 2 | Biased statement/s about the product's capabilities           | 36.4%          | 41.6%          | 14.5%                      | 5.2%              | 2%                |
| 3 | Claims of superiority over a competitor's products            | 27%            | 39.5%          | 17.7%                      | 10.4%             | 5.2%              |
| 4 | Message/s in an advertisement that can be proven to be untrue | 28.4%          | 32.6%          | 25.2%                      | 10.5%             | 3.1%              |

The higher percentage of responses that sat within the ‘somewhat agree’ category provide clear indication that the larger percentage of participants were not entirely sure that puffery was an exaggeration made about a product’s characteristics. However, the larger percentages of participants who either ‘strongly agreed’ or ‘somewhat agreed’ that puffery is an exaggeration about the product’s characteristics show that most participants knew that puffery did involve the element of exaggeration. The larger percentage of responses that indicated that these consumers felt that puffery included competitive claims about products, biased and misleading statements shows that the lines between puffery and misleading conduct are not so clear to consumers. The majority of the participants (61%) felt that it can be a misleading practice.

### 5.2.3 Question 4

*What is the frequency of usage of puffery in online advertisements?*

| # | Question                                 | Strongly agree | Somewhat agree | Neither agree nor disagree | Somewhat disagree | Strongly disagree |
|---|--|----------------|----------------|----------------------------|-------------------|-------------------|
| 1 | All online advertisements use puffery    | 12.5%          | 46.8%          | 20.8%                      | 13.5%             | 6.2%              |
| 2 | Most online advertisements use puffery   | 26%            | 40.6%          | 20.8%                      | 9.3%              | 3.1%              |
| 3 | Some online advertisements use puffery   | 33.6%          | 38.5%          | 12.2%                      | 11.4%             | 5.1%              |
| 4 | Online advertisements do not use puffery | 1%             | 7.2%           | 12.5%                      | 22.9%             | 56.2%             |

The responses to this question were mixed. There were a large percentage of participants (33.6%) who felt that some online advertisements had puffery. There were also a large number that felt that most online advertisements had puffery (40.6%) or all online advertisements had puffery (46.8%). This indicates that there is consumer awareness of the existence of puffery usage in online advertisements; but their thoughts on the extent of puffery varied considerably. The clear indication was, however, that a large percentage of participants (56.2%) disagreed with the fact that online advertisements do not use any puffery. This indicates consumers' ability to identify puffery in advertisements.

### 5.2.4 Question 5

*How do you determine that puffery has been used?*

| # | Question   | Strongly agree | Somewhat agree | Neither agree nor disagree | Somewhat disagree | Strongly disagree |
|---|--|----------------|----------------|----------------------------|-------------------|-------------------|
| 1 | Based on the claim made, it is clear that it is an exaggeration            | 28.8%          | 52.5%          | 12.3%                      | 6.4%              | 0%                |
| 2 | By taking steps to verify the authenticity of the claims made              | 33.6%          | 36.8           | 18.9%                      | 7.3%              | 3.1%              |
| 3 | Based on knowledge of the past practice of the company selling the product | 29.4%          | 40%            | 21%                        | 5.2%              | 4.2%              |

71.3% of participants agreed ('strongly agree' and 'somewhat agree') that they would be able to recognise puffery from the claim made. This confirms consumer knowledge about puffery. There was, however, an indication that larger percentages of participants also felt that puffery could only be discernible after steps were taken to verify the claims and based on knowledge of past practice of the company selling the product. This indicates that puffery can be identified from claims made by advertisers but that further investigation is required to decide whether they are to be believed.



### 5.2.5 Question 6

*How frequently do you use the following sources to verify claims made in online advertisements?*

| # | Question  | Always | Most of the time | About half the time | Sometimes | Never |
|---|---|--------|------------------|---------------------|-----------|-------|
| 1 | Checking with others online                               | 18.9%  | 32.6%            | 14.7%               | 24.2%     | 9.4%  |
| 2 | Checking buyers' confidence ratings                       | 32.6%  | 33.6%            | 9.4%                | 17.8%     | 6.3%  |
| 3 | Using a search engine like Google to get more information | 40.2%  | 34%              | 11.3%               | 13.4%     | 1%    |
| 4 | Consumer Affairs Reports                                  | 5.2%   | 12.5%            | 12.5%               | 26%       | 43.7% |
| 5 | Sourcing information offline                              | 10.5%  | 18.9%            | 9.4%                | 36.8%     | 24.2% |

The responses here showed that the online medium is the most popular avenue for verification of claims. Buyer's confidence ratings also played a big part in providing confidence to consumers. The clear indication that this question provided is that verification is an important step prior to purchases. This highlights the fact that most consumers are not convinced of the truth of claims made in online advertisements.

### 5.2.6 Question 7

*Why do marketers use puffery?*

| # | Question                                    | Strongly agree | Somewhat agree | Neither agree nor disagree | Somewhat disagree | Strongly disagree |
|---|---|----------------|----------------|----------------------------|-------------------|-------------------|
| 1 | To help promote their products              | 75%            | 21.8%          | 2%                         | 1%                | 0%                |
| 2 | To make their products seem more attractive | 74.7%          | 22.1%          | 2.1%                       | 1%                | 0%                |
| 3 | To entice consumers to buy their products   | 76.8%          | 22.1%          | 1%                         | 0%                | 0%                |

|   |   |       |       |       |       |      |
|---|---|-------|-------|-------|-------|------|
| 4 | To unfairly differentiate their product | 30.5% | 29.4% | 27.3% | 10.5% | 2.1% |
|---|---|-------|-------|-------|-------|------|

The majority of participants felt that puffery usage was for promotion of products. 76.8% also felt, however, that puffery was used to influence purchase decisions. Larger percentages of participants also felt that puffery was used to gain an advantage over other competitors. This indicates that, although puffery is not to be believed, it does have the power to convince consumers about the products it promotes.

#### 5.2.7 Question 8

*Describe the accuracy of the following statement with regard to your own experience with online purchasing: Online purchasing is challenging*

| # | Answer                     | Count |
|---|----------------------------|-------|
| 1 | Strongly agree             | 19.1% |
| 2 | Somewhat agree             | 41.4% |
| 3 | Neither agree nor disagree | 17.1% |
| 4 | Somewhat disagree          | 15.1% |
| 5 | Strongly disagree          | 7%    |

The majority of the responses here (61.5%) confirmed the fact that online purchasing is challenging. When these responses are compared with the high number of participants who have shopped online, it appears to show that online shopping has advantages that make it attractive despite the challenges it poses to consumers.

If Strongly disagree or Somewhat disagree is selected, proceed to Question 10

#### 5.2.8 Question 9

*If online purchasing poses a considerable challenge, which of the following may be the reason for it?*

| # | Question | Strongly agree | Somewhat agree | Neither agree nor disagree | Somewhat disagree | Strongly disagree |
|---|----------|----------------|----------------|----------------------------|-------------------|-------------------|
|---|----------|----------------|----------------|----------------------------|-------------------|-------------------|

|   |  |       |       |       |       |    |
|---|--|-------|-------|-------|-------|----|
| 1 | Cannot verify the authenticity of the product                                  | 50%   | 41.8% | 6.7%  | 1.3%  | 0% |
| 2 | The prevalence of pop-ups that can cause a distraction                         | 32.8% | 27.3% | 23.2% | 16.4% | 0% |
| 3 | The seller is seen to be deceitful (cannot determine details about the seller) | 21.9% | 47.9% | 27.3% | 2.7%  | 0% |
| 4 | Not very comfortable to disclose financial details                             | 32.8% | 49.3% | 13.6% | 4.1%  | 0% |

The primary cause of online purchasing being challenging was because of the inability to verify the authenticity of products. Coupled with the fact of mistrust of a seller's intentions, this is a clear indication that there is consensus as to the fact that online advertisements have the potential to be misleading. Security of payment was another major cause for making online purchasing a challenging option.

#### 5.2.9 Question 10

*To what extent is it important for a consumer to have the following categories of knowledge about the product/s they are going to purchase online?*

| # | Question  | Must have it | Very important | Slightly important | May be useful | Not required |
|---|---|--------------|----------------|--------------------|---------------|--------------|
| 1 | Need to know about the history of the product           | 20.8%        | 44.7%          | 18.75%             | 13.5%         | 2%           |
| 2 | Need to know all the details about the product          | 40%          | 44.2%          | 9.4%               | 5.2%          | 1%           |
| 3 | Need to have purchased and used the product before      | 9.4%         | 14.7%          | 27.3%              | 27.3%         | 21%          |
| 4 | Need to know about other similar products in the market | 16.8%        | 43.1%          | 25.2%              | 11.5%         | 3.1%         |

It is clear from the responses here that verification and prior knowledge about the product were considered essential for online purchases. This once again indicates that the majority of

participants felt that online advertisements can be misleading. It also implies that puffery may not be easily distinguished from misleading claims.

### 5.2.10 Question 11

*Where can misleading online advertisements be found?*

| # | Question   | Strongly agree | Somewhat agree | Neither agree nor disagree | Somewhat disagree | Strongly disagree |
|---|--|----------------|----------------|----------------------------|-------------------|-------------------|
| 1 | A search result from a search engine (e.g. Yahoo, Google etc.) | 34.3%          | 46.8%          | 11.4%                      | 7.2               | 0%                |
| 2 | Social Media platform (eg Facebook, Twitter etc.)              | 44.7%          | 37.5%          | 12.5%                      | 5.2%              | 0%                |
| 3 | YouTube  | 30.5%          | 38.9%          | 23.1%                      | 4.2%              | 3.1%              |
| 4 | Email sites  | 37.2%          | 40.4%          | 15.9%                      | 4.2%              | 2.1%              |

The responses here show the prevalence of misleading online advertisements across the different online platforms. They also show that advertisements were not only found on search engines or websites but also on social media and personal communication sites such as email.

### 5.2.11 Question 12

*Have you been misled by an online advertisements before?*

| # | Answer | Percentage |
|---|--------|------------|
| 1 | Yes    | 55.6%      |
| 2 | No     | 44.4%      |

Slightly more than 50% of the participants had been misled by online advertisements. This affirms the contention that online purchasing is challenging and that advertisers do use the online medium to promote their products in a misleading way.

The next Question had to be answered if ‘Yes’ was selected for Question 12

### 5.2.12 Question 13

*Have you ever managed to get a remedy for being misled by an online advertisement?*

| # | Answer | Percentage |
|---|--------|------------|
| 1 | Yes    | 37.5%      |
| 2 | No     | 62.5%      |

The responses show that remedies are not always within reach of the consumer. The larger proportion of participants surveyed did not manage to obtain a remedy; and this could either denote that a remedy was pursued and the attempt was not successful, or that no remedy was pursued.

The next Question had to be answered if ‘Yes’ was Selected for the question 12.

### 5.2.13 Question 14

*One of the reasons you were misled by the online advertisement was because of the puffery used.*

| # | Answer | Percentage |
|---|--------|------------|
| 1 | Yes    | 94.1%      |
| 2 | No     | 5.9%       |

The responses to this question clearly indicate that puffery can be misleading. An extremely high percentage of participants (94.1%) were misled because of the puffery used. This is a strong indicator of the need for tighter regulation.

The next Question is to be answered if ‘Yes’ was selected for Question 14.

### 5.2.14 Question 15

*Did the puffery used*

| # | Question | Strongly agree | Somewhat agree | Neither agree nor disagree | Somewhat disagree | Strongly disagree |
|---|----------|----------------|----------------|----------------------------|-------------------|-------------------|
|---|----------|----------------|----------------|----------------------------|-------------------|-------------------|

|   |   |       |       |       |      |      |
|---|---|-------|-------|-------|------|------|
| 1 | convince you that the claims made were true                         | 33.3% | 45.8% | 12.5% | 2%   | 6.2% |
| 2 | confuse you as to what was true and what was not                    | 39.5% | 41.6% | 16.6% | 2%   | 0%   |
| 3 | seem not believable but nonetheless made the product more appealing | 31.2% | 39.5% | 16.6% | 6.2% | 2%   |
| 4 | raise a hope in you that it would be true                           | 41.6% | 35.4% | 14.5% | 4.1% | 4.1% |

The clear inference of these responses was that puffery had an influence on purchases made. They also clearly show that puffery had the capability of confusing a consumer as to what is true. The larger percentage of participants felt that puffery worked effectively to promote the products; but its effects on participants varied.

The next question is to be answered if ‘Yes’ was selected for Question 12.

#### 5.2.15 Question 16

*Other possible reasons why you were misled by the online advertisement/s was because*

| # | Question  | Strongly agree | Somewhat agree | Neither agree nor disagree | Somewhat disagree | Strongly disagree |
|---|---|----------------|----------------|----------------------------|-------------------|-------------------|
| 1 | you could not verify authenticity of the claim made                                     | 42.3%          | 48%            | 9.6%                       | 0%                | 0%                |
| 2 | the advertisement was confusing   | 33.3%          | 39.2%          | 23.5%                      | 3.9%              | 0%                |
| 3 | of the urgency in which you had to make decisions regarding the purchase of the product | 41.1%          | 31.3%          | 19.6%                      | 5.8%              | 1.9%              |
| 4 | you were distracted by pop-ups  | 13.7%          | 31.3%          | 23.5%                      | 19.6%             | 11.7%             |

The responses gathered here once again show that challenges posed in online shopping are a contributor to consumers being misled.

The next question is to be answered if ‘No’ was selected for Question 12.

### 5.2.16 Question 17

*You were never misled by online advertisements before because*

| # | Question   | Strongly agree | Somewhat agree | Neither agree nor disagree | Somewhat disagree | Strongly disagree |
|---|--|----------------|----------------|----------------------------|-------------------|-------------------|
| 1 | you understood the difference between the puffery used and what was misleading | 23.2%          | 51.1%          | 20.9%                      | 2.3%              | 2.3%              |
| 2 | you verified the authenticity of the claims before making a purchase           | 45.2%          | 35.7%          | 7.1%                       | 7.1%              | 4.7%              |
| 3 | the advertisements were not misleading   | 11.9%          | 16.6%          | 35.7%                      | 26.1%             | 9.5%              |
| 4 | you were well informed about the product you were purchasing                   | 40.4%          | 35.7%          | 16.6%                      | 4.7%              | 2.3%              |

From this category, of consumers who were never misled by online advertisements, it was interesting to note that 45.2% and 35.7%, respectively, strongly agreed or somewhat agreed that this was because they had verified the authenticity of the claims before purchase. In addition, 40.4% said they were not misled because they already knew about the products to be purchased. This implies that online advertisements can have the tendency to mislead consumers if no proper checks are made before purchase. On the other hand, there were also large percentages of participants who were able to discern between puffery and misleading claims.

### 5.2.17 Question 18

*To what extent do you agree with the following statement? Misleading online advertisements are a serious problem.*

| # | Answer                     | Percentage |
|---|----------------------------|------------|
| 1 | Strongly agree             | 50.5%      |
| 2 | Somewhat agree             | 42.2%      |
| 3 | Neither agree nor disagree | 5.1%       |
| 4 | Somewhat disagree          | 2%         |

|   |                   |    |
|---|-------------------|----|
| 5 | Strongly disagree | 0% |
|---|-------------------|----|

Almost all participants thought that misleading online advertisements are a serious problem. This indicates that most of the participants felt that such advertisements are present and widespread.

#### 5.2.18 Question 19

*What is the possibility of this problem growing?*

| # | Answer                      | Percentage |
|---|-----------------------------|------------|
| 1 | Extremely likely            | 56.7%      |
| 2 | Somewhat likely             | 33%        |
| 3 | Neither likely nor unlikely | 8.2%       |
| 4 | Somewhat unlikely           | 2%         |
| 5 | Extremely unlikely          | 0%         |

The majority of the responses gathered here indicate that the problem of misleading online advertisements needs to be curtailed. This tells us of the possible need for tighter regulation of puffery.

This question needs to be answered if 'No' was selected for Question 13.

#### 5.2.19 Question 20

*Is it possible to obtain a remedy if you are misled by an online advertisement?*

| # | Answer   | Percentage |
|---|----------|------------|
| 1 | Yes      | 31.4%      |
| 2 | No       | 8.5%       |
| 3 | Not sure | 60%        |



This question was fielded to determine the knowledge of consumers who had not been misled by online advertisements. It was interesting to note that 60% of the participants in this group were not aware of their ability to secure a remedy.

### 5.2.20 Question 21

*What is the avenue open to you if you have been misled by an online advertisement?*

| # | Answer   | Strongly agree | Somewhat agree | Neither agree nor disagree | Somewhat disagree | Strongly disagree |
|---|--|----------------|----------------|----------------------------|-------------------|-------------------|
| 1 | Bring an action in court   | 11.1%          | 26.6%          | 32.2%                      | 17.7%             | 12.2%             |
| 2 | Report the matter to the Australian Competition and Consumer Council             | 36.2%          | 37.3%          | 18.6%                      | 4.3%              | 3.2%              |
| 3 | Lodge a complaint with the Advertising Standards Board                           | 30.3%          | 40.4%          | 20.2%                      | 5.6%              | 3.3%              |
| 4 | Report the matter to Consumer Affairs Victoria or its equivalent in other states | 45.5%          | 38.8%          | 11.1%                      | 0%                | 4.4%              |
| 5 | Try and get a refund   | 66.6%          | 23.3%          | 6.6%                       | 2.2%              | 1.1%              |

The responses showed that participants were familiar with the regulatory bodies involved in consumer protection. Participants concluded that the regulatory bodies were to be preferred as avenues for relief as opposed to the court being the sole provider of a remedy.

### 5.2.21 Question 22

*To what extent do you agree with the following statement? It is difficult to obtain a remedy for being misled by puffery in an online purchase.*

| # | Answer | Percentage |
|---|--------|------------|
|---|--------|------------|

|   |                            |       |
|---|----------------------------|-------|
| 1 | Strongly agree             | 29%   |
| 2 | Somewhat agree             | 48.3% |
| 3 | Neither agree nor disagree | 15%   |
| 4 | Somewhat disagree          | 5.3%  |
| 5 | Strongly disagree          | 2.1%  |

The large majority of consumers surveyed felt that it was difficult to obtain a remedy for being misled by puffery. This is an indication that consumers do feel that online purchasing can be risky.

Participants who selected ‘Somewhat Disagree’ or ‘Strongly Disagree’ for the last question can proceed to Question 24.

#### 5.2.22 Question 23

*If obtaining a remedy poses a certain amount of difficulty, could any of the following be a reason for it?*

| # | Question  | Strongly agree | Somewhat agree | Neither agree nor disagree | Somewhat disagree | Strongly disagree |
|---|---|----------------|----------------|----------------------------|-------------------|-------------------|
| 1 | Cost  | 43.7%          | 38.7%          | 13.7%                      | 1.2%              | 2.5%              |
| 2 | It may be time consuming                                  | 64.1%          | 28.7%          | 6.2%                       | 1.2%              | 0%                |
| 3 | It may not be protected by Australian Law                 | 45.6%          | 23.4%          | 19.7%                      | 9.8%              | 1.2%              |
| 4 | There may be evidential difficulties in proving your case | 48.1%          | 34.5%          | 14.8%                      | 1.2%              | 1.2%              |

The most significant difficulty identified here was that obtaining remedies was time consuming. Other factors also figured prominently in the responses gathered and were evenly distributed. All reasons identified point to difficulties that are unique to online purchasing only.

### 5.2.23 Question 24

*Is it possible for marketers to promote their products successfully without usage of puffery?*

| # | Answer             | Percentage |
|---|--------------------|------------|
| 1 | Definitely yes     | 38%        |
| 2 | Probably yes       | 45.6%      |
| 3 | Might or might not | 7.6%       |
| 4 | Probably not       | 6.5%       |
| 5 | Definitely not     | 2.1%       |

More than 80% of the participants thought that marketers could use alternatives to puffery in their promotion of products. This implies that participants welcomed advertisements that were truthful and not confusing or misleading. The participants in the survey echoed the same sentiments as those in the focus groups with regard to this question.

The questions below are Demographic Profile questions and were used for data analysis purpose only. Further details on the demographics of the participants are provided in the analysis part of this chapter.

### 5.2.24 Question 25

*What is your gender?*

| # | Answer | Percentage |
|---|--------|------------|
| 1 | Male   | 47.8%      |
| 2 | Female | 52.2%      |

This question was used to confirm that equal number of inputs were received from each gender. It was also fielded to detect whether there was a difference in purchasing decisions and vulnerability of participants to puffery usage based on gender.

### 5.2.25 Question 26

*What age group do you fall in?*

| # | Answer         | Percentage |
|---|----------------|------------|
| 1 | 18-20 years    | 9.7%       |
| 2 | 21-30 years    | 22.8%      |
| 3 | 31-40 years    | 18.4%      |
| 4 | 41-50 years    | 32.6%      |
| 5 | 51-60 years    | 10.8%      |
| 6 | Above 60 years | 5.4%       |

Question 26 helped to determine age levels of those who purchased online. This was to confirm that there were representations from different age groups in the survey.

### 5.2.26 Question 27

*What age group do you fall in?*

| # | Answer   | Percentage |
|---|--|------------|
| 1 | Year 12  | 13.1%      |
| 2 | Bachelor Degree                                      | 45%        |
| 3 | Master's Degree                                      | 32.9%      |
| 4 | PhD  | 7.6%       |
| 5 | Technical and Further Education (TAFE) Qualification | 3.2%       |
| 6 | Below Year 12  | 0%         |

This last question was used to determine levels of education of the participants. This was done in order to draw out data to see whether higher levels of education made puffery less misleading.

Once the findings of the survey were produced, the next required step was to test the survey instrument and results for reliability and validity. A detailed discussion of this is given next.

### **5.3 Introduction to Analysis**

The survey that was developed after analysis of data from the focus groups was carried out from February to March 2016. The online survey hosted by Qualtrics produced data, the analysis of which is presented in the following discussion. Partial Least Square-Structured Equation Modelling (PLS-SEM) was chosen as the method for analysing the data. SmartPLS, one of the leading software tools for PLS-SEM, was used to interpret the data.

### **5.4 Data Analysis Using Partial Least Square–Structured Equation Modelling (PLS-SEM)**

The details of the survey data analysis from the testing of both the measurement and structural parts of the research model are presented here. The chapter also reports on the outcomes of the propositions and hypotheses of this study.

The online survey that was launched collected data from 94 participants. The confirmatory second generation multivariate analysis technique, called Partial Least Square (PLS) based structural equation modelling, was used to analyse the data.

The following steps were taken:

1. The contribution of each scale item to represent a construct and its reliability in estimating relationship with other constructs was tested using the confirmatory analysis procedure in PLS.
2. The structural model was tested.
3. Hypothesized relationships were tested and the associated statistical power of the model has been explained.

#### ***5.4.1 Survey and Sampling Procedure***

The data for the survey were collected via an online survey set up using Qualtrics (Full details are given in Chapter 3). The survey targeted people aged 18 and above who had shopped online in the past. The respondents were also required to be residing in Australia. A convenience sampling was employed to carry out the survey. The survey was administered between February and March 2016.

Table 5.1 below summarizes the findings from demographic details gathered from the survey.

**Table 5.1: Demographics**

| <b>Measure</b>                      |                    | <b>Valid<br/>Per Cent</b> |
|-------------------------------------|--------------------|---------------------------|
| <b>Gender</b>                       | Male               | 43.62%                    |
|                                     | Female             | 56.38%                    |
| <b>Age group</b>                    | 18-20 years        | 8.5%                      |
|                                     | 21-30 years        | 22.3%                     |
|                                     | 31-40 years        | 23.4%                     |
|                                     | 41 -50 years       | 29.8%                     |
|                                     | 51-60 years        | 10.6%                     |
|                                     | Above 60 years     | 5.3%                      |
| <b>Frequency of Online Shopping</b> | 1-3 times          | 23.4%                     |
|                                     | 4 -7 times         | 18.1%                     |
|                                     | 7 -10 times        | 7.4%                      |
|                                     | More than 10 times | 51.1%                     |
|                                     |                    |                           |

#### ***5.4.2 Characteristics of Participants***

Demographic data were gathered via four questions relating to gender, age group, frequency of online shopping, and educational level of the participants. The data were collected to provide an understanding of whether gender made a difference in terms of opinions regarding puffery, and whether one gender had a higher involvement in online shopping. The data also helped to determine the frequency of online shopping amongst the different age groups; and assisted in drawing conclusions about whether higher educational levels made the participants more discerning and well informed about puffery and their legal rights. 94 responses were collected, and the following points were noted. The survey was well participated in by members of both genders, and there was slightly higher distribution of female online shoppers.

A cross tabulation of the results shows that 49 of the 94 people surveyed had shopped more than 10 times. This indicates that online shopping is becoming very popular. The largest number of shoppers (21) who did online shopping fell within the age group 41-50 years of age. This second largest number of such shoppers (11) fell within the 31-40 years age group. This indicates that it is not only people from the younger age brackets that are involved in online purchasing.

Almost an equal number of males and females from the different age groups were involved in online shopping and in the frequency of shopping as well. This suggests that online shopping is not used more by one gender.

A Bachelor degree was the highest level of academic qualification (46% of the participants) and a Master's degree was the second highest level (32% of the participants). This provides a good basis upon which the responses to the other questions can be measured. It helps in determining the relevance of education level and purchase decisions. Confirmation can be obtained with regards to whether the level of belief in puffery differs across people of differing education levels.

#### ***5.4.3 Preliminary Evaluation***

A preliminary evaluation was carried out with the objective of getting the data ready for assessment of measurement and an assessment of the structural models. Visual inspection of the data was carried out for identifying errors in the data set and for correcting them. Other data screening processes such as identification of missing data and tests for violations of statistical assumptions such as normality and outliers were done (Hair 2007; Pallant 2011). Out of a total of 104 survey attempts, 94 were complete entries, and thus there were no issues of missing data for the 94 responses.

A normality test was then carried out. The normality test determines whether a data set is well modeled by a normal distribution or to compute how likely an underlying random variable is to be normally distributed. For statistical tests, the assumption of normality is a prerequisite (Coakes et al. 2010; Hair 2006). Sometimes, however, it might happen that some data might be imperfectly normal. "Each variable should be approximately normally distributed, although factor analysis is fairly robust against violations of this assumption" (Allen, Bennett & King, 2010, p. 200). An observation of the Structural Equation Model output can indicate normality of data (Holmes-Smith, Coote & Cunningham 2005). All data collected in this study were determined to be normal.

#### ***5.4.4 SEM Sampling Size Requirement***

Analysis of data using PLS requires that minimum sample size should be at least ten times the largest number of structural paths that are directed towards a main construct in the structural model (Hair, Ringle and Sarstedt 2011 pp.139-152; Henseler, Ringle and Sinkovics 2009 pp.277-3; Ringle, Sarstedt and Straub 2012).

The largest number of paths that point to a construct in the structural model for this research are four. They represent the relationships between “falsification”, “legal uncertainty” “product knowledge” and “puffery message” which all have four indicators or arrows pointing towards the constructs respectively. Based on the ten times rule of thumb, the required minimum sample size is 70. Here the sample size is 94, thus it is adequate.

A power analysis for this study was executed because the ten times rule of thumb provides only a rough estimate of the minimum sample size requirement and would thus be likely to yield low power of hypothesis testing (Marcoulides & Saunders 2006). The power analysis was executed by using guidelines proposed by Cohen (1992) for the statistical power analyses in multiple regression models (Hair, Ringle & Sarstedt 2013).

Table 5.2 illustrates the sample size recommendation, in order to be able detect R<sup>2</sup> values for a statistical power of 80%, based on the assumption that it is a widely used level of statistical power.



**Table 5.2: Sample Size Recommendation in PLS for a Statistical Power of 80%**

| Maximum number of arrows pointing at a construct | SIGNIFICANCE LEVEL |      |     |      |            |      |     |      |            |      |     |      |
|--|--------------------|------|-----|------|------------|------|-----|------|------------|------|-----|------|
|  | 1%                 |      |     |      | 5%         |      |     |      | 10%        |      |     |      |
|  | Minimum R2         |      |     |      | Minimum R2 |      |     |      | Minimum R2 |      |     |      |
| 1  | 0.10               | 0.25 | .50 | 0.75 | 0.10       | 0.25 | .50 | 0.75 | 0.10       | 0.25 | .50 | 0.75 |
| 2  | 158                | 75   | 47  | 38   | 110        | 52   | 33  | 26   | 88         | 41   | 26  | 21   |
| 3  | 176                | 84   | 53  | 42   | 124        | 59   | 38  | 30   | 100        | 48   | 30  | 25   |
| 4  | 191                | 91   | 58  | 46   | 137        | 65   | 42  | 33   | 111        | 53   | 34  | 27   |
| 5  | 205                | 98   | 62  | 50   | 147        | 70   | 45  | 36   | 120        | 58   | 37  | 30   |
| 6  | 217                | 103  | 66  | 53   | 157        | 75   | 48  | 39   | 128        | 62   | 40  | 32   |
| 7  | 228                | 109  | 69  | 56   | 166        | 80   | 51  | 41   | 136        | 66   | 42  | 35   |
| 8  | 238                | 114  | 73  | 59   | 174        | 84   | 54  | 44   | 143        | 69   | 45  | 37   |
| 9  | 247                | 119  | 76  | 62   | 181        | 88   | 57  | 46   | 150        | 73   | 47  | 39   |
| 10   | 256                | 123  | 79  | 64   | 189        | 91   | 59  | 48   | 156        | 76   | 49  | 41   |

Source: Cohen (1992)

The following criteria (Hair, Ringle & Sarstedt 2013) have been taken into account for detecting the minimum R2 value of 0.50 from Table 5.2:

- 1) Significance level of 5%
- 2) Statistical power 80%
- 3) Maximum number of arrows pointing at a construct

Based on findings from Table 5.2, 65 observations are required to obtain the statistical power of 80%, for the purpose of detecting a R2 value of 0.25 with a 5% chance of probability of error. Loadings of between 0.586 and 0.984 on their intended constructs are seen in all measurement items retained in the final measurement model. Thus, it can be observed that there is satisfaction of all the four criteria for a statistical power analysis. The sample size examined in this thesis is 94, and this satisfies the minimum requirement to run PLS based on the ten times rule of thumb as well as on a power analysis.

Figure 5.1 presents the research model for the present study.



**Figure 5.1 Research Model**

Based on Figure 5.1:

- The path coefficients that point towards the Construct of Product Knowledge are three in number (moving from the Constructs of Verification, Falsification, and Exaggeration), and the path coefficient that points toward the main Construct of Marketer's use of Puffery is one in number (moving from the Construct of Product Knowledge).
- The path coefficients that point towards the Construct of Puffery Message are two in number (moving from the Constructs of Legal Uncertainty, and Online Advertisements), and the path coefficient that points towards the main construct Construct of Marketer's use of Puffery is one in number (moving from the Construct of Puffery Message).

Whilst running PLS, the overall model is subjected to boot strapping (where 1,000 sub samples are extrapolated). The final model had several constructs with indicators ranging from low as two to four indicators. PLS allows for removal of indicators from each construct, and it

was decided to remove any indicator below 0.70 from the initial model. In the final analysis, eight indicators below 0.70 were identified, and these were removed from the model and a final PLS run was conducted. More than acceptable levels of composite reliability ranging from as low as 0.76 were displayed by all constructs in the final model.

Table 5.3 illustrates the relationship between the Constructs, Questions used in the survey, and the hypotheses.

**Table 5.3 Relevance of Survey Questions to Constructs and Hypotheses**

| Questions in Survey  | Constructs                  | Hypothesis  |
|--|-----------------------------|---|
| <p>Q6. How frequently do you use the following sources to verify claims made in online advertisements?</p> <p>Q6 1 - Checking with other online</p> <p>Q6 2 - Checking buyer's confidence ratings</p> <p>Q6 3 - Using a search engine like Google to get more information</p>  | <b>Verification</b>         | <b>H1</b> - Need for verification of product knowledge highlights consumer insecurities |
| <p>Q15. Did the puffery used</p> <p>Q15 2 - confuse you as to what was true and what was not</p> <p>Q15 3 - seem not believable but nonetheless made the product more appealing</p>  | <b>Falsification</b>        | <b>H2</b> - Falsification distorts consumer knowledge                                   |
| <p>Q16. Other possible reasons why you were misled by the online advertisements was because</p> <p>Q16 1 you could not verify authenticity of the claim made</p> <p>Q16 2 the advertisement was confusing</p>  | <b>Exaggeration</b>         |   |
| <p>Q3. What is puffery?</p> <p>Q3 2 Biased statement/s about the product's capabilities</p> <p>Q3 3 Claims of superiority over a competitor's products</p> <p>Q3 4 Message/s in an advertisement that can be proven to be untrue</p>   | <b>Legal Uncertainty</b>    | <b>H3</b> - Exaggeration blurs the line between acceptable and misleading practice      |
| <p>Q21. What is the avenue open to you if you have been misled by an online advertisement?</p> <p>Q21 2 Report the matter to the Australian Competition and Consumer Council</p> <p>Q21 3 Lodge a complaint with the Advertising Standards Board</p> <p>Q21 4 Report the matter to Consumer Affairs Victoria or its equivalent in other states</p> <p>Q21 5 Try and get a refund</p> | <b>Online advertisement</b> | <b>H4</b> - Consumers uncertainty as to legal remedies enhances puffery usage           |

|   |                                 |  |
|---|---------------------------------|--|
| <p>Q4. What is the frequency of usage of puffery in online advertisements?<br/> Q4 1 All online advertisements use puffery<br/> Q4 2 Most online advertisements use puffery</p> <p>Q10. To what extent is it important for a consumer to have the following categories of knowledge about the products they are going to purchase online?<br/> Q10 1 Need to know about the history of the product<br/> Q10 2 Need to know all the details about the product<br/> Q10 3 Need to have purchased and used the product before<br/> Q10 4 Need to know about other similar products in the market</p> | <p><b>Product knowledge</b></p> | <p><b>H5-</b> Online advertisements increase avenues for puffery messages</p> <p><b>H6 -</b> Consumers' lack of product knowledge impacts positively on marketers use of puffery</p> |
| <p>12. Where can misleading advertisements be found?<br/> Q12 1 A search result from a search engine<br/> Q12 2 Social Media platform<br/> Q12 3 YouTube<br/> Q12 4 Email site</p>  | <p><b>Puffery Message</b></p>   | <p><b>H7 -</b> Tenets of Puffery message increases consumers perceptions of marketer's use of puffery</p>  |

#### 5.4.5 The use of Partial Least Square – Structured Equation Modelling (PLS-SEM)

The structural components of both the measurement and structural model were examined using PLS-SEM. SEM is widely used to analyse the cause-and-effect relations between latent constructs (Hair, Ringle & Sarstedt, 2011). PLS has been utilized by researchers to test complete theories and concepts (Hair et al. 2012), and has become a recognised quasi-standard in research in marketing and management (Ringle et al. 2012).

The model in Figure 5.1 was analysed using PLS-Adanco 2.0 (Henseler, Ringle & Sarstedt 2015). The goodness of fit of a theoretical model is established by the strength of each structural path and the combined productiveness of its exogenous constructs (Duarte & Raposo, 2010).

PLS had two stages of analysis (Barclay, Higgins & Thompson 1995; Santosa, Wei & Chan 2005):

- In the first stage, the measurement model is estimated showing statistics (loadings) that help to assess the reliability and validity of the variables and their respective indicators.
- In the second stage, an examination of the results for the structural model will show the relationships (i.e. path coefficients) between the constructs and the explained variance.

Usage of PLS will help to show the assumed predictors that have substantive links to outcomes, by estimating the relative strength of relationships using the path loading of the predictors. It is also possible to judge the extent a variation in one set of variables might explain a variance in another variable of interest by using R<sup>2</sup>. Figure 5.1 illustrates the PLS data analysis procedure in this study.

#### ***5.4.6 Reflective measurement model***

Individual item reliability in PLS was assessed by examining the loading ( $\lambda$ ) or simple correlations of the measures with their respective content. This was done as a part of the convergence check of each of the reflective manifest variables with the associated latent variable. The commonly used threshold for acceptable item reliability is  $\lambda \geq 0.7$ . The implication of this is that there is more than a 50% shared variance between the construct and its measures (Barclay, Higgins & Thompson 1995; Fornell & Bookstein 1982). Other studies however have showed that a lower value such as 0.4 - 0.6 is also acceptable when exploratory research is carried out (Hair et al. 1998; Hinkin 1995; Quaddus & Holfmeyer 2007). A minimum value of 0.5 ( $\lambda \geq 0.5$ ) was thus adopted as the standard that would be used to accept the reliability of the individual items, since the nature of this research is exploratory.

With the exception of QN15 3 and QN11 4, which have loadings of in between 0.45 - 0.6, all other outer loading scores on their expected factors are above 0.623. This is a recommended level (Hair et al. 2014). The items in QN15 3 and QN11 4 are not discarded, as they are still considered acceptable since this research is of an exploratory nature (Hulland, 1999; Hair et al. 2014).

Table 5.4 shows us that the two reflective constructs have high levels of internal consistency reliability. The AVE values (convergent validity) are above the minimum required level of 0.50, thus demonstrating convergent validity for all the constructs.

**Table 5.4 Psychometric Properties for reflective measurement model**

| Construct Name            | Item Code | Measurement type | Loading | Composite Reliability | AVE    | Cronbach Alpha | t-value |
|---------------------------|-----------|------------------|---------|-----------------------|--------|----------------|---------|
| Marketer's use of puffery | QN7 1     | Reflective       | 0.8840  | 0.9385                | 0.8358 | 0.9014         | 23.0855 |
|                           | QN7 2     |                  | 0.9413  |                       |        |                | 60.5452 |
|                           | QN7 3     |                  | 0.9165  |                       |        |                | 27.8594 |
| Exaggeration              | QN3 2     | Reflective       | 0.8496  | 0.8586                | 0.6717 | 0.7668         | 13.3588 |
|                           | QN3 3     |                  | 0.8991  |                       |        |                | 23.0844 |
|                           | QN3 4     |                  | 0.6963  |                       |        |                | 4.8402  |
| Falsification             | QN15 2    | Reflective       | 0.7451  | 0.8031                | 0.5131 | 0.6912         | 2.8560  |
|                           | QN15 3    |                  | 0.4915  |                       |        |                | 1.2698  |
|                           | QN16 1    |                  | 0.8388  |                       |        |                | 4.4340  |
|                           | QN16 2    |                  | 0.7430  |                       |        |                | 3.3851  |
| Verification              | QN6 1     | Reflective       | 0.7759  | 0.8101                | 0.5876 | 0.6684         | 3.0006  |
|                           | QN6 2     |                  | 0.7174  |                       |        |                | 2.5558  |
|                           | QN6 3     |                  | 0.8039  |                       |        |                | 3.3742  |
| Product Knowledge         | QN10 1    | Reflective       | 0.8227  | 0.8447                | 0.5772 | 0.7607         | 14.6328 |
|                           | QN10 2    |                  | 0.7660  |                       |        |                | 13.4722 |
|                           | QN10 3    |                  | 0.6848  |                       |        |                | 6.9660  |
|                           | QN10 4    |                  | 0.7592  |                       |        |                | 11.5379 |
| Puffery Message           | QN11 1    | Reflective       | 0.6830  | 0.8265                | 0.5489 | 0.7317         | 5.0488  |
|                           | QN11 2    |                  | 0.8729  |                       |        |                | 20.1538 |
|                           | QN11 3    |                  | 0.7900  |                       |        |                | 9.5568  |
|                           | QN11 4    |                  | 0.5856  |                       |        |                | 4.3107  |
| Online Advertisement      | Qn14 1    | Reflective       | 0.7544  | 0.8671                | 0.7684 | 0.7686         | 3.3629  |
|                           | QN14 2    |                  | 0.9837  |                       |        |                | 5.7089  |
| Legal Uncertainty         | QN21 2    | Reflective       | 0.7367  | 0.8454                | 0.5800 | 0.7714         | 2.5322  |

|  |           |  |        |  |  |  |        |
|--|-----------|--|--------|--|--|--|--------|
|  | QN21<br>3 |  | 0.8468 |  |  |  | 3.2596 |
|  | QN21<br>4 |  | 0.8031 |  |  |  | 3.4873 |
|  | QN21<br>5 |  | 0.6444 |  |  |  | 3.1591 |

#### 5.4.7 Discriminant Validity

This is another way of assessing the reflective model. The extent to which a given construct and its measurement items are different from other constructs and their measurement items is determined by examining discriminant validity. Measures from one construct can overlap the conceptual territory of another construct. Discriminant Validity is used to address this problem. For adequate discriminant validity, PLS requires that a construct should share more variance with its measures than it shares with other constructs in the model (Barclay, Higgins & Thompson 1995). Adequate discriminant validity requires the following two rules to be observed:

- i) Indicator Level Discriminant Validity: Manifest variables should load more strongly on their respective theoretically assigned construct than on any other constructs in the model: i.e. an individual construct's item loading should be higher than cross-loading. (see Table 5.5)
- ii) Construct Level Discriminant Validity: The square root of AVE of an individual construct should be much larger than inter-construct correlations (Agarwal & Karahanna, 2000; Chin, Marcolin & Newsted 2003; Quaddus & Hofmeyer 2007; Rai, Patnayakuni & Seth 2006).

The square root of AVE between the constructs and their measures gives us the diagonal components. Off-diagonal components indicate the correlations between constructs. For discriminant validity, diagonal components should be larger than off-diagonal components in the same row and column. Table 5.5 shows that the diagonal components are found to be larger than off-diagonal elements in the same row and column.

**Table 5.5 Construct Level Discriminant Validity**

| Constructs | Marketer's<br>Use of<br>Puffery | Exaggeration | Falsification | Verification | Product<br>Knowledge | Puffery<br>Message | Online<br>Advertisement | Legal<br>Uncertainty |
|------------|---------------------------------|--------------|---------------|--------------|----------------------|--------------------|-------------------------|----------------------|
|------------|---------------------------------|--------------|---------------|--------------|----------------------|--------------------|-------------------------|----------------------|

Marketer's  
Use of Puffery      **0.8358**

|                             |        |               |               |               |               |               |               |               |
|-----------------------------|--------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|
| <b>Exaggeration</b>         | 0.0990 | <b>0.6717</b> |               |               |               |               |               |               |
| <b>Falsification</b>        | 0.0306 | 0.0137        | <b>0.5131</b> |               |               |               |               |               |
| <b>Verification</b>         | 0.0117 | 0.0043        | 0.0246        | <b>0.5876</b> |               |               |               |               |
| <b>Product Knowledge</b>    | 0.0700 | 0.1131        | 0.0336        | 0.0545        | <b>0.5772</b> |               |               |               |
| <b>Puffery Message</b>      | 0.1239 | 0.0257        | 0.0072        | 0.0116        | 0.0639        | <b>0.5489</b> |               |               |
| <b>Online Advertisement</b> | 0.1124 | 0.1002        | 0.0091        | 0.0245        | 0.0656        | 0.0561        | <b>0.7684</b> |               |
| <b>Legal Uncertainty</b>    | 0.0893 | 0.0473        | 0.0114        | 0.0186        | 0.0306        | 0.0798        | 0.0185        | <b>0.5800</b> |

---

Squared correlations.  
AVE in the diagonal

By comparing the loadings across the columns in the matrix below (Table 5.6), we are able to see that an indicator's loadings on its own construct are higher than to all of its cross-loadings with other constructs in all cases. The conclusion that can be drawn from this is that there is discriminant validity between all the constructs based on the cross-loadings criterion (Hair, Ringle & Sarstedt 2013).

#### ***5.4.8 Quality of the measurement model***

The AVE values are normally examined in order to measure the quality of the measurement model. Table 5.5 shows us that the AVE values for all first-order reflective constructs were between 0.548 and 0.835. This is greater than the cut-off value of 0.5 and is deemed acceptable (Fornell & Larcker 1981). Thus, the quality of the measurement model is confirmed.



**Table 5.6 Cross Loading results - Indicator Level Discriminant Validity**

| Indicator | Marketer's Use of Puffery | Exaggeration  | Falsification | Verification  | Product Knowledge | Puffery Message | Online Advertisement | Legal Uncertainty |
|-----------|---------------------------|---------------|---------------|---------------|-------------------|-----------------|----------------------|-------------------|
| Q71Prom   | <b>0.8746</b>             | 0.2455        | 0.1434        | 0.0726        | 0.2014            | 0.3515          | 0.3703               | 0.3120            |
| Q72Attrac | <b>0.9313</b>             | 0.2680        | 0.1415        | 0.0893        | 0.2733            | 0.3100          | 0.2674               | 0.3136            |
| Q73Entic  | <b>0.9067</b>             | 0.3438        | 0.1923        | 0.1335        | 0.2424            | 0.2924          | 0.2710               | 0.1790            |
| Q32Biase  | 0.2248                    | <b>0.8406</b> | 0.1115        | 0.0637        | 0.2928            | 0.1618          | 0.2827               | 0.2366            |
| Q33Supe   | 0.3211                    | <b>0.8896</b> | 0.0851        | 0.0134        | 0.3295            | 0.1602          | 0.2854               | 0.1694            |
| Q34Mess   | 0.2021                    | <b>0.6889</b> | 0.0988        | 0.1348        | 0.1369            | 0.0106          | 0.1736               | 0.0932            |
| Q152Con   | 0.1514                    | 0.0802        | <b>0.7371</b> | 0.1447        | 0.1156            | 0.0647          | 0.0643               | 0.0588            |
| Q153Not   | 0.0432                    | -0.0135       | <b>0.4863</b> | 0.2610        | 0.0677            | -0.0048         | 0.1655               | 0.0369            |
| Q161Ver   | 0.2090                    | 0.1452        | <b>0.8299</b> | 0.0483        | 0.1863            | 0.0994          | 0.1055               | 0.0204            |
| Q162Adc   | 0.0233                    | 0.0548        | <b>0.7351</b> | 0.1094        | 0.1102            | 0.0403          | -0.0405              | 0.2246            |
| Q61Other  | 0.0651                    | 0.0378        | 0.0549        | <b>0.7677</b> | 0.1924            | -0.0054         | 0.1214               | 0.0678            |
| Q62Ratin  | 0.0814                    | 0.2169        | 0.1072        | <b>0.7097</b> | 0.0952            | 0.0752          | 0.0970               | 0.1576            |
| Q63Sere   | 0.1004                    | -0.0150       | 0.1877        | <b>0.7953</b> | 0.2059            | 0.1681          | 0.1300               | 0.1149            |
| Q101Hist  | 0.1286                    | 0.3275        | 0.1691        | 0.1869        | <b>0.8139</b>     | 0.1282          | 0.2401               | 0.1147            |
| Q102Det   | 0.2695                    | 0.2658        | 0.0949        | 0.1629        | <b>0.7578</b>     | 0.1912          | 0.1605               | 0.2403            |
| Q103Use   | 0.0038                    | 0.1124        | 0.1494        | 0.2191        | <b>0.6775</b>     | 0.1382          | 0.1441               | 0.0787            |
| Q104Simi  | 0.3061                    | 0.2500        | 0.1469        | 0.1604        | <b>0.7511</b>     | 0.2809          | 0.2087               | 0.0765            |
| Q111Serr  | 0.2980                    | 0.1291        | 0.0513        | -0.0590       | 0.1844            | <b>0.6757</b>   | 0.1727               | 0.2049            |
| Q112Soc   | 0.3285                    | 0.1391        | 0.0181        | 0.1753        | 0.2083            | <b>0.8636</b>   | 0.2488               | 0.2872            |
| Q113Yout  | 0.1646                    | 0.1052        | 0.1441        | 0.0593        | 0.1356            | <b>0.7816</b>   | 0.1244               | 0.1246            |
| Q114Ema   | 0.1620                    | 0.0768        | 0.0997        | 0.1367        | 0.2089            | <b>0.5793</b>   | 0.0822               | 0.1457            |
| Q41All_1  | 0.3017                    | 0.3541        | 0.0840        | 0.1358        | 0.2480            | 0.0710          | <b>0.7463</b>        | 0.1794            |
| Q42Most   | 0.3122                    | 0.2759        | 0.0896        | 0.1472        | 0.2336            | 0.2594          | <b>0.9733</b>        | 0.1111            |
| Q212AC    | 0.1823                    | 0.2414        | 0.0869        | 0.0468        | 0.1873            | 0.0869          | 0.1099               | <b>0.7289</b>     |
| Q213ASB   | 0.2470                    | 0.1983        | 0.1359        | 0.0321        | 0.1322            | 0.1800          | 0.1285               | <b>0.8378</b>     |
| Q214CAV   | 0.3138                    | 0.3239        | 0.1285        | 0.0410        | 0.2264            | 0.2241          | 0.1202               | <b>0.7945</b>     |
| Q215Ref   | 0.1388                    | -0.0304       | -0.0044       | 0.2197        | 0.0257            | 0.2595          | 0.0626               | <b>0.6376</b>     |

#### 5.4.9 Structural Model

The next step in the process was an assessment of the structural model results. This involved an examination of the relationship between the constructs and the model's predictive capabilities (Hair et al. 2013). A bootstrap analysis was performed. Bootstrapping is a statistical

technique that falls under the broader heading of resampling. Bootstrapping can be used in the estimation of nearly any statistic. An objective of such inferential statistics is to determine the value of a parameter of a population. This is done by sampling a population, measuring a statistic of that sample, and then using that statistic to say something about the corresponding parameter of the population (Henderson 2005). It was done in this research to assess the statistical significance of the path coefficients. This took place after a computing of the path estimates found in the structural model. The actual sample size is 94, and 300 resamples were carried out. The estimates for the structural model relationships (path coefficients) were obtained by applying the PLS-SEM algorithm. These represent the hypothesized relationship between the constructs.

The four-step guideline (Hair et al. 2014) listed below was used to assess the structural model:

**Step 1** -Assessment of structural model for Co-linearity issues

**Step 2** - Assessment of the relevance and significance of the structural model relationships

**Step 3** - Assessment of the level of Coefficient Determination ( $R^2$ )

**Step 4** - Assessment of the Effect Sizes ( $f^2$ )

#### *5.4.9.1 Step 1 -Multicollinearity*

Multicollinearity is a state of very high inter-correlations or inter-associations among the independent variables. It is a type of disturbance in the data. Its presence in the data indicates that the statistical inferences made about the data may not be reliable (Yoo et al. 2014). It can be tested using bivariate correlations among the indicators or by using the variance inflation factor (VIF) and tolerance statistics. It is mainly centred on discovering the correlation among the predictors using the size of  $1-R^2$  (j) (Cenfetelli & Bassellier 2009). Acceptable VIF is  $<3.3$  (Diamantopolous & Siguaw 2006) to indicate an absence of collinearity. This is, however, on a more stringent valuation. A more flexible value is  $<10.00$  (Hair et al. 1998). All indicators in this Construct show a value that ranges from 1.11 - 4.09, which indicates that the constructs are free from multicollinearity issues (see Table 5.7).

**Table 5.7 Collinearity Values Among Constructs**

| Indicator                        | Marketer's Use of Puffery | Exaggeration | Falsification | Verification | Product Knowledge | Puffery Message | Online Advertisement | Legal Uncertainty |
|----------------------------------|---------------------------|--------------|---------------|--------------|-------------------|-----------------|----------------------|-------------------|
| Q32Biased_1                      |                           | 1.5556       |               |              |                   |                 |                      |                   |
| Q33Superior                      |                           | 1.8201       |               |              |                   |                 |                      |                   |
| Q34Message                       |                           | 1.4801       |               |              |                   |                 |                      |                   |
| Q41All_1                         |                           |              |               |              |                   |                 | 1.6382               |                   |
| Q42Most_1                        |                           |              |               |              |                   |                 | 1.6382               |                   |
| Q61Others_1                      |                           |              |               | 1.2659       |                   |                 |                      |                   |
| Q62Ratings_                      |                           |              |               | 1.4528       |                   |                 |                      |                   |
| Q63Sereng_                       |                           |              |               | 1.2852       |                   |                 |                      |                   |
| Q71Promote                       | 2.2532                    |              |               |              |                   |                 |                      |                   |
| Q72Attract_1                     | 4.0939                    |              |               |              |                   |                 |                      |                   |
| Q73Entice_1                      | 3.5030                    |              |               |              |                   |                 |                      |                   |
| Q101History_                     |                           |              |               |              | 1.7556            |                 |                      |                   |
| Q102Details_                     |                           |              |               |              | 1.4540            |                 |                      |                   |
| Q103Used_1                       |                           |              |               |              | 1.5118            |                 |                      |                   |
| Q104Similar_                     |                           |              |               |              | 1.3725            |                 |                      |                   |
| Q111Serresu                      |                           |              |               |              |                   | 1.3438          |                      |                   |
| Q112Socmed                       |                           |              |               |              |                   | 1.6864          |                      |                   |
| Q113Youtub                       |                           |              |               |              |                   | 2.0752          |                      |                   |
| Q114Email_1                      |                           |              |               |              |                   | 1.6589          |                      |                   |
| Q152Confus                       |                           |              | 1.4854        |              |                   |                 |                      |                   |
| Q153Notbelie                     |                           |              | 1.2178        |              |                   |                 |                      |                   |
| Q161Verauth                      |                           |              | 1.4104        |              |                   |                 |                      |                   |
| Q162Adconfu                      |                           |              | 1.4289        |              |                   |                 |                      |                   |
| Q212ACCC_                        |                           |              |               |              |                   |                 |                      | 2.6317            |
| Q213ASB_1                        |                           |              |               |              |                   |                 |                      | 2.7360            |
| Q214CAV_1                        |                           |              |               |              |                   |                 |                      | 2.2762            |
| Q215Refund_                      |                           |              |               |              |                   |                 |                      | 1.1152            |
| Variance inflation factors (VIF) |                           |              |               |              |                   |                 |                      |                   |

#### 5.4.9.2 Step 2 - Assessment of the relevance and significance of the structural model relationships

Table 5.8 illustrates the three relationships found in the Conceptual Model:

- 1) the relationship between the independent variables (Verification, Falsification, and Exaggeration) and the mediating variable (Product knowledge).
- 2) the relationship between the mediating variables (Product knowledge, and Puffery Message) and the Dependant variable (Marketer's use of Puffery).
- 3) the relationship between the independent variables (Legal uncertainty, and Online Advertisements) and the mediating variable (Puffery Message).

**Table 5.8 Results of Bootstrapping for Structural Model Evaluation.**

| Hypothesis | Path  | $\beta^a$    | Std. Error | t-value | Sig.   | Expected Sign | Result        |
|------------|---|--------------|------------|---------|--------|---------------|---------------|
| H1         | Verification-> Product knowledge              | 0.1949       | 0.1075     | 1.8134  | 0.0354 | Positive      | Supported     |
| H2         | Falsification-> Product knowledge             | 0.1163       | 0.0864     | 1.3469  | 0.0895 | Positive      | Not Supported |
| H3         | Exaggeration-> Product knowledge              | 0.3099       | 0.0823     | 3.7675  | 0.0001 | Positive      | Supported     |
|            | <b>R2</b>                                     | <b>0.171</b> |            |         |        |               |               |
| H4         | Legal uncertainty-> Puffery message           | 0.2550       | 0.1120     | 2.2757  | 0.0118 | Positive      | Supported     |
| H5         | Online advertisement-> Puffery message        | 0.2021       | 0.1303     | 1.5512  | 0.0610 | Positive      | Not Supported |
|            | <b>R2</b>                                     | <b>0.157</b> |            |         |        |               |               |
| H6         | Product knowledge-> Marketer's use of puffery | 0.1876       | 0.0987     | 1.9001  | 0.0292 | Positive      | Supported     |
| H7         | Puffery Message-> Marketer's use of puffery   | 0.3046       | 0.1041     | 2.9254  | 0.0019 | Positive      | Supported     |
|            | <b>R2</b>                                     | <b>0.120</b> |            |         |        |               |               |

*1) The relationship between the Independent Variables (Verification, Falsification and Exaggeration) and the Mediating Variable (Product Knowledge).*

Table 5.8 shows the direct inference results evaluating the relationship between Verification, Falsification, and Exaggeration, as independent variables, and Product Knowledge postulated as the mediating variable in this research. These results demonstrate that Verification, Falsification and Exaggeration positively contribute to explaining the variance in Product Knowledge experienced. In examining the relevance of a significant relationship between the three exogenous constructs and Product Knowledge, the results show that Exaggeration ( $\beta = 0.3099$ ) has a relatively higher impact on Product Knowledge followed by Verification ( $\beta = 0.1949$ ) and then finally Falsification ( $\beta = 0.1163$ ) impacting relatively the least. This stresses the importance of considering Exaggeration as an important construct in influencing Marketers' use of Puffery.

*2) The relationship between the independent variables (Legal uncertainty and Online Advertisements) and the mediating variable (Puffery Message)*

Table 5.8 presents a summary of the bootstrap results evaluating the relationship between Legal Uncertainty and Online Advertisement, as independent variables, and Puffery Message as the mediating variable. With regard to the proposed relationship, the results provide support for a strong positive significant relationship for the two hypothesised relationships. For all the supported hypotheses the coefficient is from 0.20 to 0.25, indicating a small to medium effect, and significant at a level of  $p < 0.10$ , 0.05 and 0.00. The results demonstrate that Legal Uncertainty has a larger effect on Puffery Message, with  $\beta = 0.2550$ . However, Online Advertisement shows less significance ( $p < 0.10$ ,  $t\text{-value} = 1.5512 < 1.645$  (critical value) and  $\beta = 0.2021$ ).

*3) The relationship between the Mediating Variables (Product knowledge, and Puffery Message) and the Dependant variable (Marketer's use of Puffery)*

Table 5.8 shows the results where the mediating variable (Product Knowledge) has a positive significant relationship with the Dependant variable (Marketers' use of Puffery) with a coefficient of more than 0.1 ( $\beta = 0.1876$   $t\text{-value} = 1.9001$ ). It also shows that the mediating variable (Puffery Message) has a positive significant relationship with the Dependant variable (Marketers' use of Puffery) with a coefficient of more than 0.2 ( $\beta = 0.3046$   $t\text{-value} = 2.9254$ ), demonstrating a larger effect significant at a level of  $p < 0.00$ .

#### *5.4.9.3 Step 3: Assessment of Coefficient of Determination ( $R^2$ )*

The explanatory power of the structural model was determined by examining the significance and relevance of the path coefficients.  $R^2$  values, the coefficient of determination, help explain the explanatory power (Hair et al 2012).  $R^2$  represents the amount of variance in the endogenous constructs. The endogenous constructs in this model are Puffery Message, Product Knowledge, and Marketers' use of Puffery.  $R^2$  values of 0.67, 0.33, or 0.19, for endogenous latent constructs in the inner model, are described as substantial, moderate, or weak, respectively (Chin, 1988). The  $R^2$  result for this research (see Figure 5.1) shows as 0.157 for Marketers' use of puffery, as explained by the independent variables (Exaggeration, Verification, Falsification, Legal Uncertainty, and Online Advertisement). As per recommendations of Chin (1988), the variance of value in use can be interpreted as weak. The structural model also shows  $R^2 = 0.171$  for the variation in Product Knowledge, and  $R^2 = 0.120$  for Puffery Message, which once again shows a weak variation. Jim Frost (2013) made the following observations:

“In some fields, it is entirely expected that your R-squared values will be low. For example, any field that attempts to predict human behavior, such as psychology, typically has R-squared values lower than 50%. Furthermore, if your R-squared value is low but you have statistically significant predictors, you can still draw important conclusions about how changes in the predictor values are associated with changes in the response value. Regardless of the R-squared, the significant coefficients still represent the mean change in the response for one unit of change in the predictor while holding other predictors in the model constant”.

This research is largely based on predicting human behaviour in terms of making purchase decisions, and thus  $R^2$  values are naturally weak and low.

#### *5.4.9.4 Step 4 - Assessment of the Effect Sizes ( $f^2$ )*

“A significant F-test indicates that the observed R-squared is reliable, and is not a spurious result of oddities in the data set. Thus, the F-test determines whether the proposed relationship between the response variable and the set of predictors is statistically reliable, and can be useful when the research objective is either prediction or explanation” (Martin 2013).

The effect size of the structural model was evaluated using Cohen's  $f^2$  (Cohen, 1988). The effect size is calculated as the increase in  $R^2$  relative to the proportion of variance that remains unexplained in the endogenous construct (Peng & Lai 2012). The  $f^2$  effect size measures the influence a selected predictor construct has on the  $R^2$  values of an endogenous construct. Cohen categorizes the  $f^2$  value of 0.02 as small, 0.15 as medium, and 0.35 as large effect sizes of the predictive values.

Table 5.9 shows us that, with respect to the relationship between the exogenous constructs and Product Knowledge, the analysis reveals that Exaggeration ( $f^2 = 0.1140$ ), Falsification ( $f^2 = 0.0157$ ) and Verification ( $f^2 = 0.0466$ ) each have a significant and positive impact on Product knowledge with a small effect size. There is also a significant and positive impact of Product knowledge on Marketers' use of Puffery ( $f^2 = 0.0391$ ) with a small to medium effect.

With reference to Table 5.10 the relationship between the endogenous constructs and Puffery Message, the analysis shows that Legal Uncertainty ( $f^2 = 0.0725$ ) and Online Advertisement ( $f^2 = 0.456$ ) show a significant and positive relationship with a small effect. It also shows a significant and positive impact of Puffery Message on Marketers' use of Puffery ( $f^2 = 0.1030$ ) with a medium effect.

**Table 5.9 Relationship between the exogenous constructs and Product Knowledge**

|   | Product knowledge |        | Effect size |
|---|-------------------|--------|-------------|
| Effect                                      | Beta              | $f^2$  |             |
| Exaggeration                                | 0.3099            | 0.1140 | Small       |
| Falsification                               | 0.1663            | 0.0157 | Small       |
| Verification                                | 0.1949            | 0.0446 | Small       |
| Product Knowledge Marketer's use of puffery |                   | 0.0391 | Small       |
| 0.1876                                      |                   |        |             |

**Table 5.10 Relationship between the endogenous constructs and Puffery Message**

|                      | Puffery Message                     |                      | Effect size |
|----------------------|-------------------------------------|----------------------|-------------|
| <b>Effect</b>        | <b>Beta</b>                         | <b>f<sup>2</sup></b> |             |
| Legal Uncertainty    | 0.2550                              | 0.0725               | Small       |
| Online Advertisement | 0.2021                              | 0.0456               | Small       |
| Puffery Message      | Marketer's use of puffery<br>0.3046 | 0.1030               | Medium      |

#### ***5.4.10 Evaluation of Mediating Effects***

There are seven hypotheses presented in this thesis, and five of them were evaluated for mediating effects. The five are as follows:

1. Mediating effect of Product Knowledge between Verification and Marketers' use of Puffery
2. Mediating effect of Product Knowledge between Falsification and Marketers' use of Puffery
3. Mediating effect of Product Knowledge between Exaggeration and Marketers' use of Puffery
4. Mediating effect of Puffery Message between Online Advertisement and Marketers' use of Puffery
5. Mediating effect of Puffery Message between Legal Uncertainty and Marketers' use of Puffery

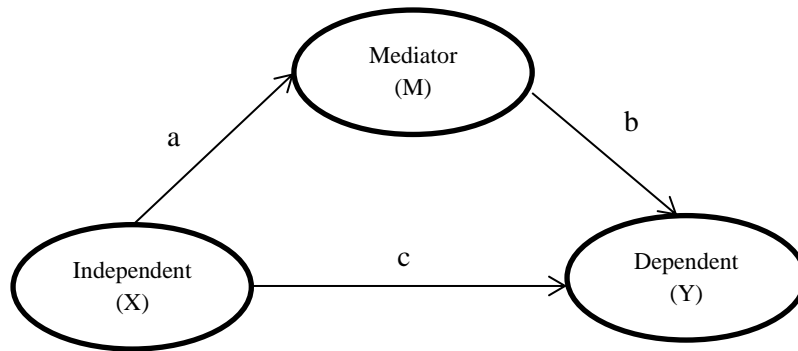
A Mediation analysis was performed to test the mediating effect on Marketers' use of Puffery. The analysis performed was based on guidelines given by Zhao, Lynch and Chen (2010). A mediation model, as seen in Figure 5.2, was drawn up. The effect of the independent variable X (exogenous construct) on a mediator (M) is represented by a. The effect of the mediator on dependant variable Y (endogenous construct) is represented by b. Fairchild and McQuillin (2010) have stated that the mediator (M) is regarded as a third variable or an intermediary variable in the link between X and Y. Thus, the indirect effect is seen as a product term of a x b.

The total effect of the X and Y relationship consists of:



- the direct effect of X on Y, represented by c
- the indirect effect of X on Y through M ( $a \times b$ )

The total effect of X on Y is  $c = (a \times b) + c$ .



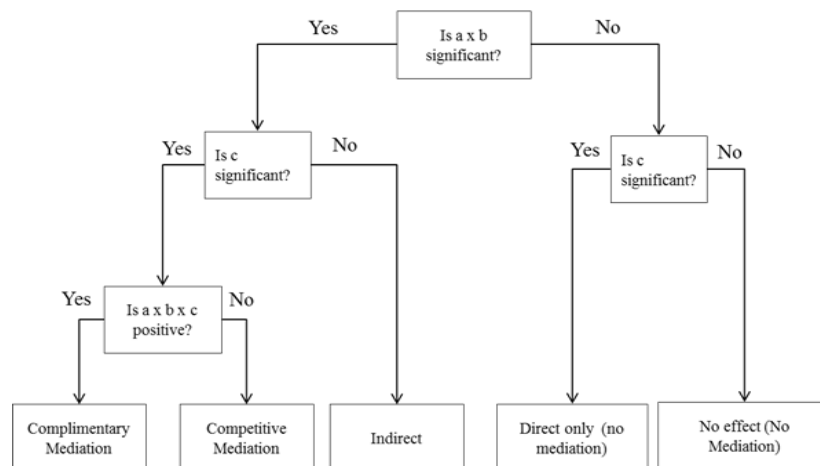
**Figure 5.2 Three Variable Non-Recursive Causal model**

Source: Zhao, Lynch and Chen (2010)

Notes: a, b and c are path coefficients.

#### 5.4.11 Criteria for Evaluating Mediating Effects

The decision tree diagram (Figure 5.3) designed by Zhao, Lynch and Chen (2010) formed the basis on which the investigation of the mediating effects of the Product knowledge and Puffery Message constructs was carried out.



**Figure 5.3 Establishing Mediation and Classifying Type**

Source: Zhao, Lynch and Chen (2010)

The approach taken by Zhao, Lynch and Chen (2010) is seen as an improvement on Baron and Kenny's (1986) popular test for establishing mediation. Zhao, Lynch and Chen

(2010) state that the only requirement needed to initiate mediation is that the indirect effect  $a \times b$  is significant in a non-recursive three-variable causal model. This, by implication, makes the “X-Y test” requirement, utilized in the Baron and Kenny (1986) procedure, immaterial. In the “X-Y test” it was proposed that the effect of an independent variable (X) on a dependant variable (Y), before a mediator is included in the model, must be significant to establish mediation. Zhao, Lynch and Chen (2010) also went on to say that no further investigation for mediation effect of M was required if this criterion was not met.

Other researchers (Shrout & Bolger, 2002) have stated that the focus should, however, be on testing the mediation effect itself. This is based on the logic that the direct effect  $a \times b$  is equivalent to the difference between the total and direct effect (Preacher & Hayes, 2008). Zhao, Lynch and Chen (2010) state that three factors need to be taken into consideration. The first factor is the size of an indirect effect to measure the strength of the mediation effect. Secondly, the significance of an indirect effect  $a \times b$  has to be fulfilled; and lastly, a bootstrap test has to be done to test the significance of the indirect path  $a \times b$ .

The first step was to determine the significance of the indirect effect  $a \times b$  to conclude whether it sits within a mediation category. The PLS result was used to indicate the results from the indirect path, path coefficients, a, b and c, and their significance. The computation was conducted separately through Excel spreadsheets (Hair et al. 2014). The classification of mediation was determined based on the direct effect of c and its significance. The following criteria were looked at to determine the type of mediation; and they are based on the typology of mediation models (Zhao, Lynch & Chen, 2010):

1. Complementary mediation occurs if indirect effect  $a \times b$  and direct effect c are significant and have the same directions. This is known as partial mediation in Baron and Kenny’s approach.
2. Competitive mediation occurs if indirect effect  $a \times b$  are both significant and have opposite directions.
3. Indirect-only mediation occurs if indirect effect  $a \times b$  is significant but not c.
4. Direct-only mediation occurs if direct effect c is significant, but not indirect effect  $a \times b$ .
5. No effect non-mediation occurs if both direct c and indirect effect  $a \times b$  are insignificant.

Projects falling within Criteria 2, 3 and 5 above may be discarded under Baron and Kenny’s approach, as they deemed to come under a no-mediation category.

#### Implications for the type of mediation or non-mediation

When complementary, competitive and indirect-only mediation occur, we can conclude that the data support the hypothesis for mediation.

In both complementary and competitive mediation, the mediator identified is consistent with the hypothesised theoretical framework, and the significant direct effect  $c$  signals that there is a possibility of an omitted second mediator. This second mediator can be examined in future studies.

Indirect-only mediation implies that the mediator identified is consistent with the hypothesised theoretical framework. Tests for further indirect effects are not required.

The sign of the direct effect in direct only non-mediation implies undiscovered mediators. No-effect non-mediation denotes failure for testing mediation (Zhao, Lynch & Chen, 2010).

#### ***5.4.12 Non-requirement of factor analysis***

Since factor analysis is embedded within the PLS software, it was not warranted to be carried for purposes of this quantitative study. The sample size in this research of 94 participants satisfies the sample size recommendations for this quantitative study. Table 5.2 found in Chapter 5 of this thesis illustrates the sample size recommendation.

#### ***5.4.13 The effect of Common method bias***

When research is carried out it is important to take into account that variations in responses may result from the instrument used to elicit responses and not from the actual predispositions of the participants (Podsakoff et al. 2003). The results can be contaminated by the 'noise' stemming from the biased instruments (Roni 2014). This is known as Common method bias.

Method variance has been found by Cote and Buckley (1987) to be the lowest in the field of marketing (15.8%) and highest in the field of education (30.5%). Since this research is based on law and marketing, the expected variance will fall within the lower percentage figure. On average, the amount of variance accounted for when common method variance is present is approximately 35% (Fuller et al. 1996; Podsakoff et al. 2000 and Wagner & Gooding 1987). Method variance can either inflate or deflate observed relationships between constructs.

There are several factors that can cause method variance to occur. The factors include Consistency motif, Implicit theories and Illusory correlations, Social desirability, Transient mood state and the ones that are elaborated below. For the purposes of this discussion, the first

four factors mentioned above have not been elaborated upon as it is felt that those factors stem a lot more from predispositions of the respondents rather than from the instrument itself.

Acquiescence is the next factor to have an impact on responses. Winkler, Kanouse, and Ware (1982, p. 555) have postulated that acquiescence occurs when participants agree with attitude statements that are worded similarly but are not conceptually related. This is problematic because it heightens the correlations among items. The questions used in this research were drafted to avoid similarity in wording.

Cronbach (Cronbach, 1946, 1950) recognized the possibility that an item's form may influence the scores obtained on a measure. He stated that consistency in scale properties may increase the covariation observed among the constructs examined. The use of similar scale formats in this research was coupled with ratings required of all possible answers. This helped counteract any form of unwarranted consistency in answers.

An Item's context is the next possible cause of bias in responses. Wainer and Keily (1987, p.187) have suggested that participant's interpretation of an item may be influenced by its relation to the other items making up an instrument. The questions were carefully drafted to cover the different components making up this research and to make them as independent as possible in their own fields of coverage.

A final factor that may influence the artifactual covariation is the broader research context in which the measures are obtained. Time, location, and media used to measure the constructs are the most prominent contextual influences. Face-to-face interviews tend to elicit responses that have a lower accuracy than computer administered questionnaires or paper-and-pencil questionnaires (Martin & Nagao, 1989 & Richman et al. 1999). In this research, the Focus groups involved face-to face discussion. The survey was carried out online. The Focus Group sessions involved participants from different backgrounds, age groups and geographical locations to minimize expression of socially desirable viewpoints.

### **Efficacy of controlling method bias**

The two primary ways to control for method biases are through the design of the study's procedures and/or statistical controls.

#### **a) Control through design of the study's procedures**

The first way is to obtain measures of the predictor and criterion variables from different sources (Podsakoff et al. 2003). This will not be elaborated here further as this way eliminates

the effects of consistency motifs, implicit theories, social desirability tendencies and dispositional and transient mood states and that is not the focus here.

The second way is to have temporal, proximal, psychological, or methodological separation of measurement. One technique used is to have respondents complete the measurement of the predictor variable under different conditions from the ones under which they completed the measurement of the criterion variable (Podsakoff et al. 2003). Researchers can use different response formats, media and/or locations for the measurement of the predictor and criterion variables. This research used face-to-face data collection via focus group sessions as well as an online quiz. One disadvantage however is that it allows contaminating factors to intervene between the measurement of the predictor and criterion variables. It also takes more time, effort, and expense to carry out (Podsakoff et al. 2003).

Adopting procedures at the response editing or reporting stage is another way to control method bias (Podsakoff et al. 2003). One procedure is to allow the respondents' answers to be anonymous. This was done at both stages of data collection in this research. Another procedure is to assure respondents that there are no right or wrong answers and that they should answer questions as honestly as possible. This was done at the Focus Group stage in this research. Tourangeau et al. (2000) cautioned researchers to define ambiguous or unfamiliar terms, keep questions simple, specific, and concise and avoid complicated syntax. All the above were considered when questions were formulated for both stages of data collection in this research. Questions were kept simple and unfamiliar terms were defined. The questions were refined to ensure there were no complications in terms of wording and meaning.

#### b) Reducing method bias through statistical controls

i) The Harman's single-factor test is the most preferred means for reducing method bias. All the variables in a study are loaded into an exploratory factor analysis (Andersson & Bateman, 1997 and Aulakh & Gencturk, 2000) and researchers examine the unrotated factor solution to determine the number of factors that are necessary to account for the variance in the variables. This procedure however does not statistically control method effects.

ii) The next statistical control that can be applied is Partial correlation procedure (Podsakoff et al. 2003). There are several different variations of this procedure. The first is partialling out social desirability or general affectivity. Williams, Gavin & Williams (1996, p. 89) state that the procedure does not distinguish between the measures of a construct and the construct itself.

It is not possible to assess whether the directly measured variable is acting as a measurement contaminant or whether it has a substantive relationship with the constructs of interest.

The second variation of the procedure is the use of a marker variable to control for common method biases (Lindell & Brandt, 2000 and Lindell & Whitney, 2001). There are three important empirical problems with the use of the marker variable technique. Firstly, the procedure is based on the assumption that common method variance can only inflate the observed relationship between a predictor and criterion variable (Lindell & Whitney, 2001, p. 115). Secondly the procedure ignores measurement error and lastly it assumes that common method factors do not interact with traits. This has been disputed by Bagozzi & Yi (1990) and Wothke & Browne (1990).

The third variation is the general factor covariate technique (Dooley & Fryxell, 1999; Podsakoff & Todor, 1985). In this procedure, the first step is to conduct an exploratory factor analysis of the variables included in the study. Then, a scale score for the first unrotated factor is calculated and partialled out of the relationship between the predictor and criterion variable. This procedure also ignores measurement error (Podsakoff et al. 2003).

iii) The third statistical control can be applied via the use of latent variable models. One approach is to measure the presumed cause of the method bias. It is then modeled as a latent construct whilst allowing the indicators of the constructs of interest to load on this factor. The drawbacks are that the researcher must be able to identify the most important sources of bias and be able to measure them. This technique assumes that the method factor does not interact with the constructs of interest (Podsakoff et al. 2003).

Another approach is by adding a first-order factor with all of the measures as indicators to the researcher's theoretical model (Conger, Kanungo, & Menon, 2000 and Podsakoff et al. 1990). The disadvantage is that it does not permit the researcher to identify the specific cause of the method bias and the number of indicators of the constructs is small relative to the number of constructs of interest.

iv) The last method to be discussed here is the use of multiple-method factors to control method variance (Bagozzi & Yi, 1990 and Cote & Buckley, 1987). The principal disadvantage of this technique is that potentially severe problems may be encountered when estimating these models because of identification problems, specification errors, and sampling errors (Spector & Brannick, 1995).

The drawbacks identified with all methods of controlling method bias seem to indicate that methods employed do not necessarily curtail them. The specific conditions under which these control methods can be effective are very restrictive and not immediately practical. In light of the many measures taken to counteract the possible effects of common method bias in this research, it is felt that the impact of common method bias is at best minimal and negligible.

## **5.5 Conclusions**

Thus, the validity and reliability of the survey instrument was proven. The recognised testing method determined the rigour of the research and results obtained. This chapter provided descriptive statistics of the findings and a detailed examination of the quantitative research method employed. The research model was obtained; and the final conclusions drawn from it are presented in the next chapter, the final chapter for this thesis. The final chapter will show how the research questions have been answered, and will put forth recommendations for reform.

## **CHAPTER SIX: DISCUSSION AND CONCLUSIONS**

### **6.1 Introduction**

This chapter provides the conclusions that were arrived at and recommendations for reform. The implications of the results are explained. The significance of each of the research factors and constructs, and their relationship within the area of puffery usage by marketers in the online environment, are elaborated upon. The following parts of the chapter discuss the effects, importance and implications of each of the independent variables, Verification, Falsification, Exaggeration, Online Advertisements, and Legal Uncertainty, and their impact upon the dependant variables, Product knowledge and Puffery Message, and the final effect of all these variables on the main construct, Marketer's use of puffery. A discussion of theories that support recommendations for reform is also given to provide the justification for reforms in this research. Following that come the recommendations for reform. The chapter then ends with a discussion of the limitations of the research and a summary.

### **6.2 Extrapolation from the PLS-SEM model**

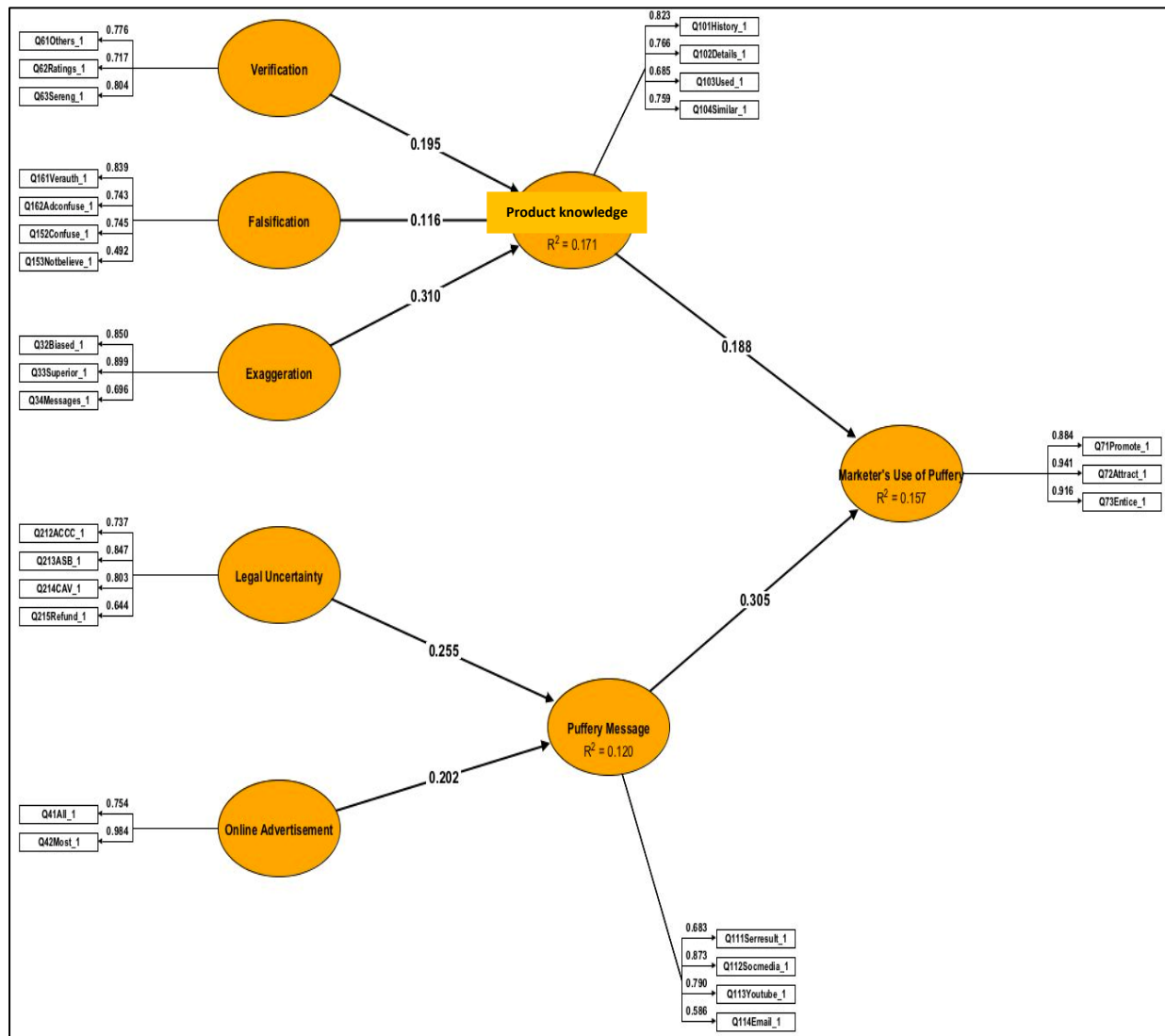
The final PLS-SEM Research model shown in Figure 6.1 was derived after a detailed analysis of the findings of the survey conducted. The research model shows that there is 17% variance in Product Knowledge, 12% variance in Puffery Message, and 15% variance in Marketer's use of Puffery. Although the variance may not be substantial, it does provide necessary data about the study from which conclusions can be drawn. Exploratory studies into human behaviour do tend to have lower variance rates (Jim Frost, 2013).

Before embarking on the conclusions drawn from this research, a brief explanation of the variables / constructs used in this research model is required. The following is a summary:

- The independent variable Verification refers to the need for checking on authenticity of the promotions before making a purchase.
- The independent variable Falsification refers to how the truth of claims made become difficult to ascertain because of the promotion containing puffery.
- The independent variable Exaggeration refers to puffery and consumers' knowledge about what constitutes puffery.
- The independent variable Legal Uncertainty is representative of the lack of knowledge of consumers as to legal remedies and avenues to obtain those remedies.



- The dependant variable Product knowledge used in the research model refers to the amount of knowledge required of a consumer before making a purchase. It signifies the need for a certain level of knowledge of the products and promotions made.
- The dependant variable Puffery Message denotes the actual promotions used containing puffery.
- The main construct Marketer's use of Puffery is as its term denotes.



**Figure 6.1 PLS-SEM Research model**

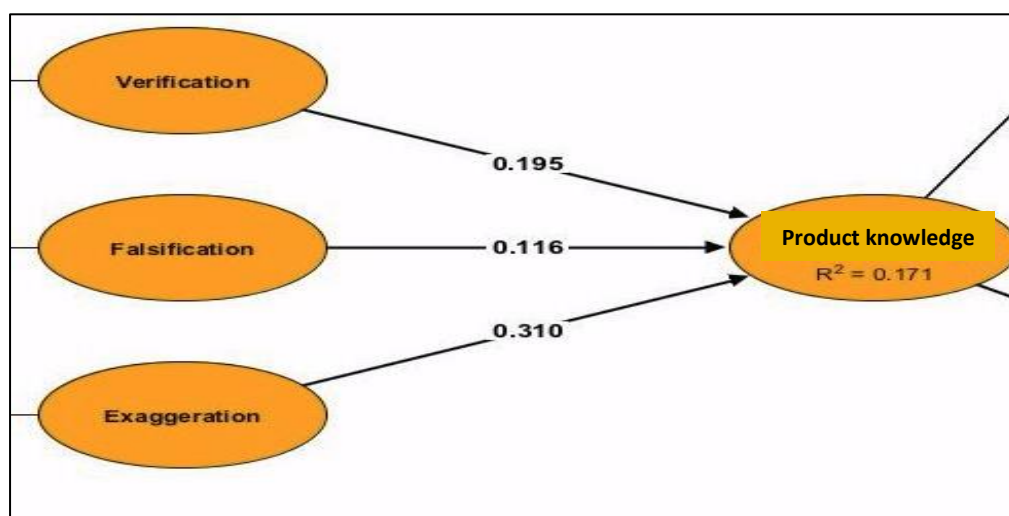
Table 6.1 shows the relevance of the constructs and the hypothesis. This is done to show the connection between the hypothesis developed and the construct in which it is represented. This makes for easy understanding of the analysis of the findings and to show how the hypothesis are supported.

**Table 6.1 Relevance of constructs and hypothesis**

| Constructs                  | Hypothesis   |
|-----------------------------|--|
| <b>Verification</b>         | <b>H1-</b> Need for verification of product knowledge highlights consumer insecurities             |
| <b>Falsification</b>        | <b>H2 -</b> Falsification distorts consumer knowledge  |
| <b>Exaggeration</b>         | <b>H3 -</b> Exaggeration blurs the line between acceptable and misleading practice                 |
| <b>Legal Uncertainty</b>    | <b>H4-</b> Consumers uncertainty as to legal remedies enhances puffery usage                       |
| <b>Online advertisement</b> | <b>H5-</b> Online advertisements increase avenues for puffery messages                             |
| <b>Product knowledge</b>    | <b>H6 -</b> Consumers' lack of product knowledge impacts positively on marketers use of puffery    |
| <b>Puffery Message</b>      | <b>H7 -</b> Tenets of Puffery message increases consumers perceptions of marketer's use of puffery |

A detailed analysis of the conclusions drawn from the research model is provided below. Snippets of the relevant parts of the Research Model (Figure 5.1) as they relate to the different parts discussed are provided as Figures to aid with the explanation.

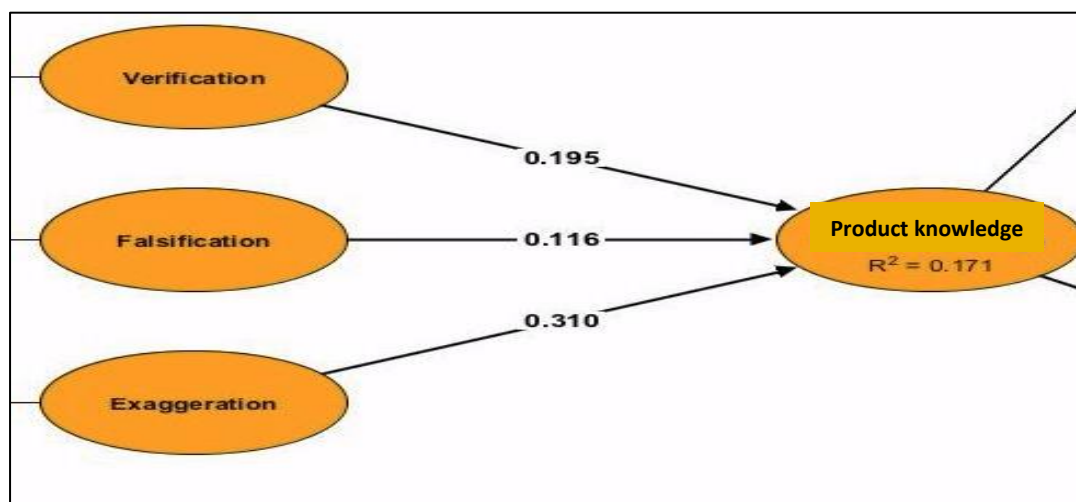
### 6.2.1 Verification and Product knowledge



**Figure 6.2a Verification and product knowledge**

There is a positive relationship between these two variables ( $\beta_a = 0.1949$ ), and the data show that a consumer's need to verify details about products before making a purchase contributes to the product knowledge. Good Product knowledge is an essential feature in order to prevent consumers from being misled. The various avenues for verification available and the frequency of their usage by consumers show that there is an increased need for verification when purchases are made online. This, by implication, shows that the challenges posed by making a purchase in an online medium (Smith R, 2000) heighten the level of insecurity felt by consumers. The focus group findings also showed that 65% of the participants were aware of the need for verification and had used one or more of the avenues for verification before making a purchase. This confirms Hypothesis H1 - Need for verification of product knowledge highlights consumer insecurities).

### 6.2.2 Falsification and Product Knowledge

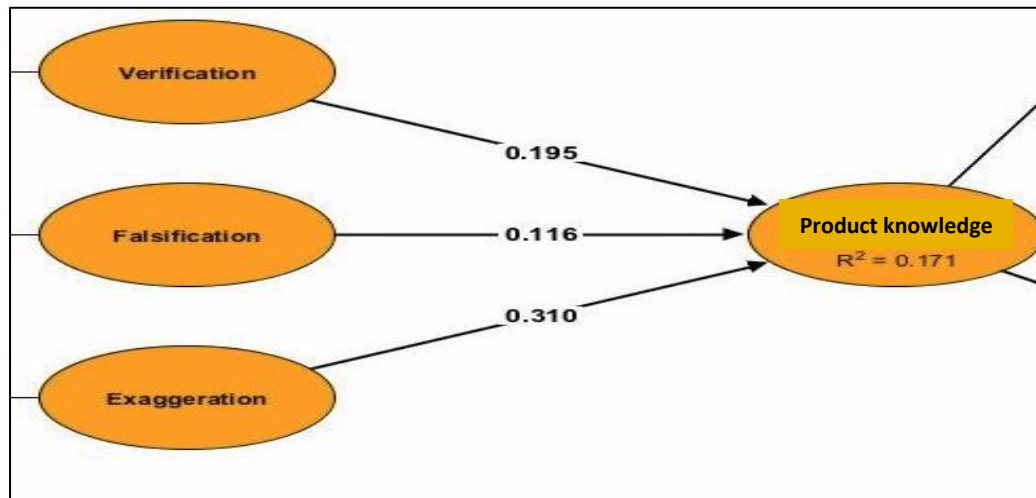


**Figure 6.2b Falsification and Product knowledge**

The relationship between these two variables ( $\beta_a = 0.1163$ ) is a positive one, indicating that Product Knowledge becomes affected by the fact that it becomes hard to ascertain the truth of online promotions (see case laws and actions taken by regulatory bodies discussed in Chapter 2). Essentially, caveat emptor (let the buyer beware), the premise upon which puffery usage is justified, becomes harder to justify as the medium used for purchases makes it more difficult for a consumer to verify the truth of claims made. Greater amount of reliance is placed upon the advertisement, and since the truth of the advertisement is cloaked by puffery, this makes the task an even more dubious one. Focus group findings also showed that 31% of the participants were unsure about what puffery was and 9% did not know what it was at all. 82% of the participants also felt that consumers needed to have good knowledge about products

prior to making a purchase to avoid being misled. This supports Hypothesis H2 - Falsification distorts consumer knowledge.

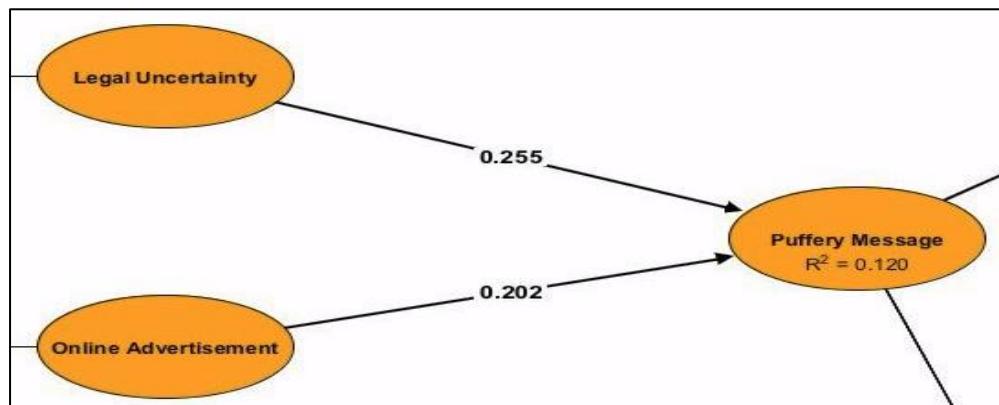
### 6.2.3 Exaggeration and Product Knowledge



**Figure 6.2c Exaggeration and Product knowledge**

The path coefficient between Exaggeration and Product Knowledge ( $\beta_a = 0.3110$ ) shows that Exaggeration (puffery) has a larger impact on Product Knowledge compared to Verification and Falsification. Product knowledge is derived from various sources such as reviews, ratings and online searches. The knowledge obtained does serve to determine the truth of the claims made in advertisements. What must be noted is that puffery is used to inform people about a product, and this also becomes part of product knowledge. It does not matter whether the claims made are believed or not (Cowley, 2006). Exaggeration is used because it works (Chonko, 1995). The positive relationship seen in the research model indicates that Exaggeration has a large impact on product knowledge of consumers and thus can influence consumers adversely. It also shows that increased usage of Exaggeration can cause consumers to be more uncertain of the truth. This is in line with the findings of Cacioppo and Petty (1989) and Garcia-Marques and Mackie (2001), who found that repeated messages have an influential effect. Campbell and Wright (2008) found that with more exposure to online ads there was a more positive attitude to advertisement. The consumer also becomes uncertain of the difference between what constitutes puffery and what constitutes misleading practice. The third hypothesis in this research, H3 - Exaggeration blurs the line between acceptable and misleading practice, is supported. The focus group findings also illustrated that 30% of the participants had a poor understanding of puffery and its ramifications and 14% had no understanding of it.

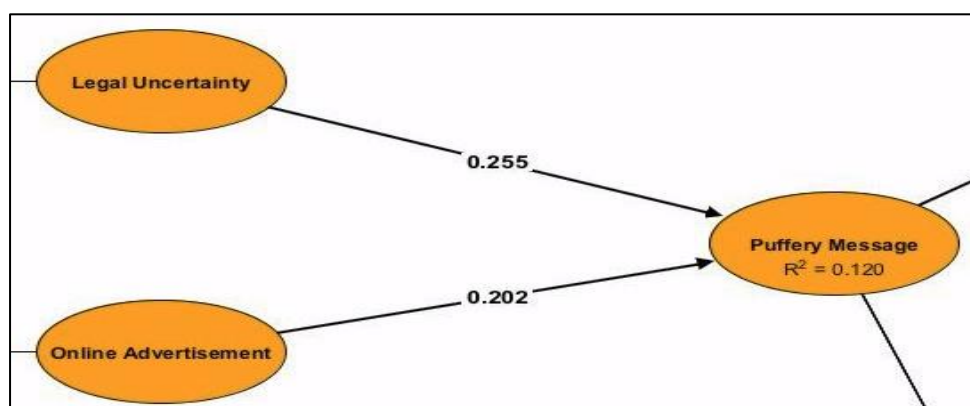
#### 6.2.4 Legal Uncertainty and Puffery Message



**Figure 6.3a Legal uncertainty and Puffery message**

Legal Uncertainty impacts on Puffery Message in a positive way ( $\beta_a = 0.255$ ). This shows that the consumer's lack of knowledge of legal remedies and the avenues available to pursue these remedies impacts upon the frequency of usage of puffery messages. Marketers will be more convinced to use puffery messages and to try and stretch the boundaries of acceptable puffery. This reflects the claim of Haan and Berkey (2002) that marketers use puffery because it works. The temptation to cross the line between misleading practice and puffery will also increase when marketers are more aware of the fact that consumers may not know where their remedies lie and, more importantly in this case, when puffery is being exploited to increase profits. The focus group findings, however, indicated that only 18% of the participants were unsure about their legal remedies. Hypothesis H4 - A consumer's uncertainty as to legal remedies available enhances puffery usage, is thus also supported.

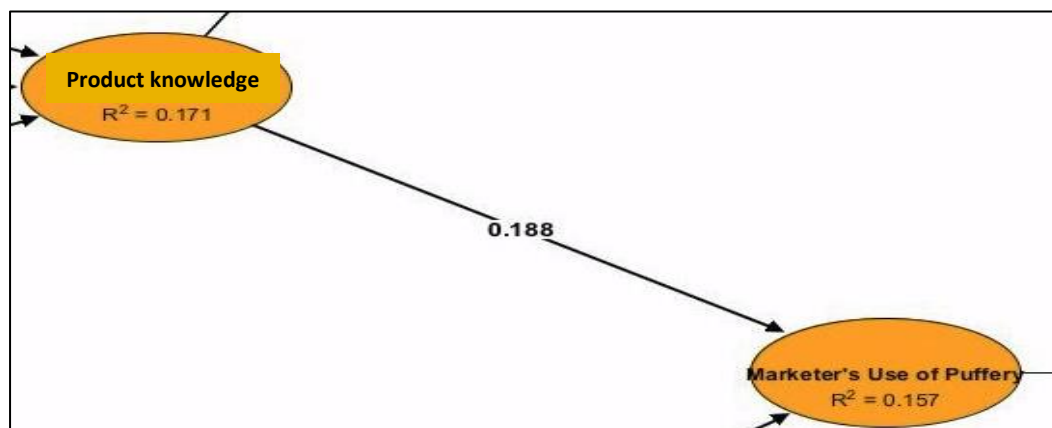
#### 6.2.5 Online advertisement and Puffery Message



**Figure 6.3b Online advertisement and Puffery message**

The link between these two variables indicates that the online medium provides many more avenues for the puffery message to be used to promote products. The evidence of a positive relationship between these two variables ( $\beta_a = 0.202$ ) illustrates the reality of marketers using the most widely used platform (Internet) for promotion and the many avenues that come with it (search engines, social media, email, and YouTube). This is in line with the data gathered about increased expenditure by marketers on online promotions and increasing migration of consumers to the cyber domain for purchases in Chapter 2 Section 2.4. The challenges posed by online purchasing make this environment one in which placing the burden on the consumer to be careful about potentially misleading practices is an unfair expectation. Hypothesis H5 - Online advertisements increase avenues for puffery messages, is thus supported here.

#### 6.2.6. Product Knowledge and Marketers' Use of Puffery

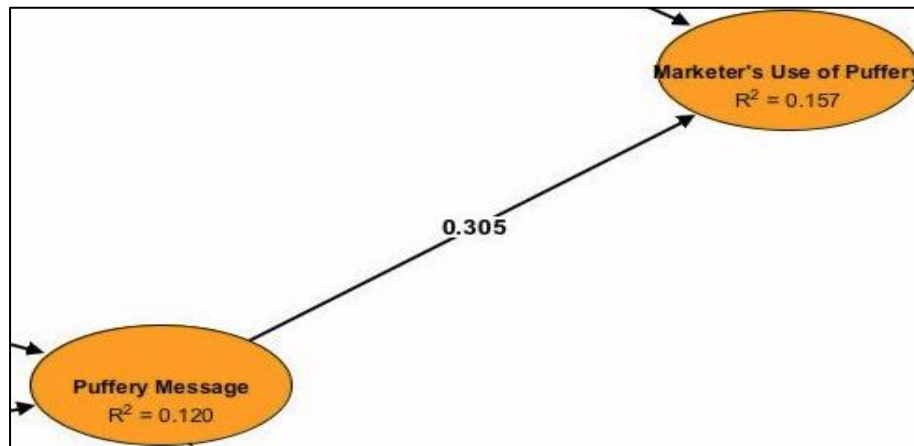


**Figure 6.4 Product knowledge and Marketers' use of Puffery**

Here we find that the positive relationship ( $\beta^a = 0.188$ ) between Product knowledge and Marketers' use of puffery shows that the level of Product Knowledge possessed by consumers is an indicative factor for marketers as to efficacy and extent of puffery usage they can have. Judging from the higher effect that Exaggeration has on Product knowledge ( $\beta^a = 0.3110$ ) compared to that of Product Knowledge on Marketers' use of Puffery ( $\beta^a = 0.188$ ), we can conclude that marketers' expectations of what consumers should know and what consumers actually know is misaligned. Kapnoullas and Clarke (2008) detailed this point as to what would characterize a reasonable person in terms of judgment of knowledge to be possessed by the consumer. In the case of *Henderson v Pioneer Homes Pty Ltd (1979) 142 CLR 294*, the standard of the consumer was said to be the standard of the "unsuspecting modest member of the community" (James 2017). Product knowledge, or rather the lack of it, provides the window

of opportunity for marketers to use it to their advantage. Hypothesis H6 - Consumers' lack of product knowledge impacts positively on Marketers' use of puffery is thus substantiated.

### 6.2.7 Puffery Message and Marketers' use of puffery

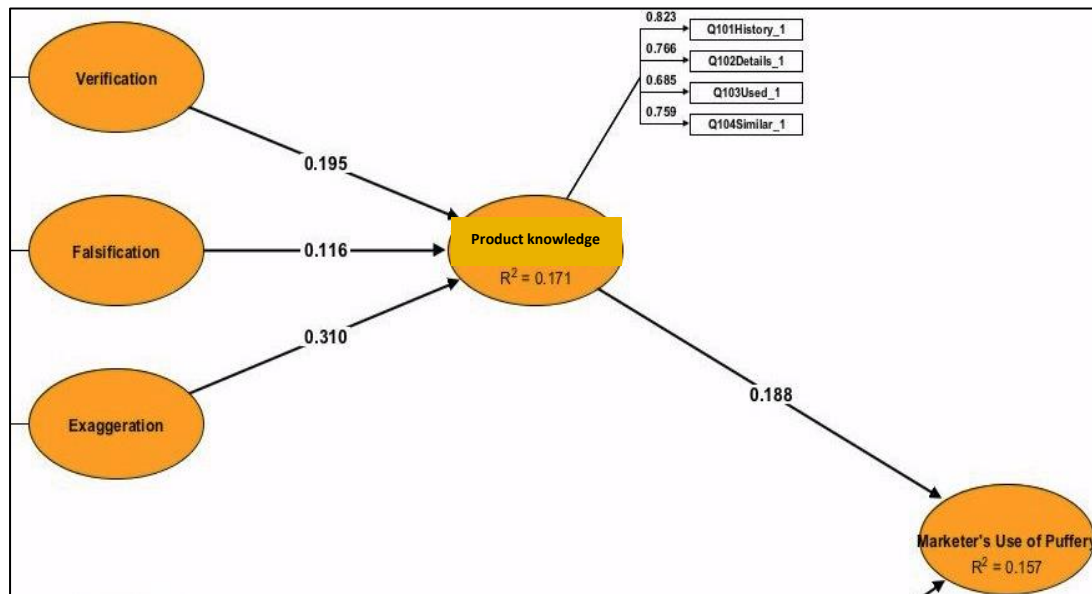


**Figure 6.5 Puffery message and Marketers' use of Puffery**

In this relationship we find the highest path coefficient ( $\beta_a = 0.305$ ) indicating the most positive relationship in the research model. Marketers' use of puffery is highly influenced by the impact of the puffery message. The puffery message helps in drawing awareness of the product in consumers' minds and thereby encouraging purchases. Puffery is not only used because it allows marketers freedom as to how they can market products but also because it influences purchases (Kamins & Marks, 1987). It is believed by a substantial number of consumers (Rotfeld & Preston, 1981). Focus group findings showed that 86% of the participants had been misled before. This supports Hypothesis H7 - Tenets of Puffery message increase consumers' perceptions of Marketers' use of puffery.



### 6.2.8 Impacts of Verification, Falsification, Exaggeration on Product knowledge; and of Product knowledge on Marketers' use of Puffery

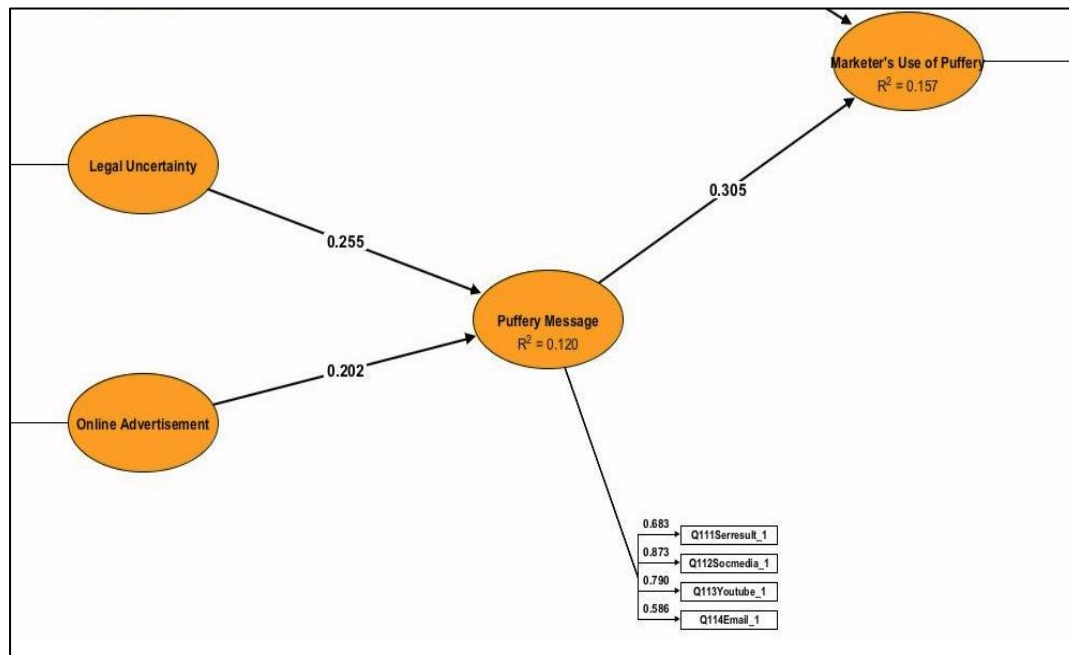


**Figure 6.6 Impacts of Verification, Falsification, Exaggeration on Product knowledge; and of Product knowledge on Marketers' use of Puffery**

If we examine this path from the research model, it indicates that Exaggeration (puffery) has the greatest impact on Product knowledge, indicating the need for Verification (checking authenticity of claims made) to ensure the Falsification (uncertainty as to the truth) does not lead a consumer towards being misled. This uncertainty and evidence of need for higher levels of knowledge before purchases are made is a factor that influences Marketers' use of puffery. Puffery works better when it may be believed. Consumers' insecurities in making online purchases do stem from having to trust the advertisement as the only avenue for knowing and checking the product, and thus the need for verification is heightened. This does, therefore, indicate that puffery blurs the line between what is and what is not to be believed. Looking at the relationship from the reverse side, we can deduce that Marketers' use of puffery is determined by the extent to which product knowledge is sufficient to prevent consumers from being misled.



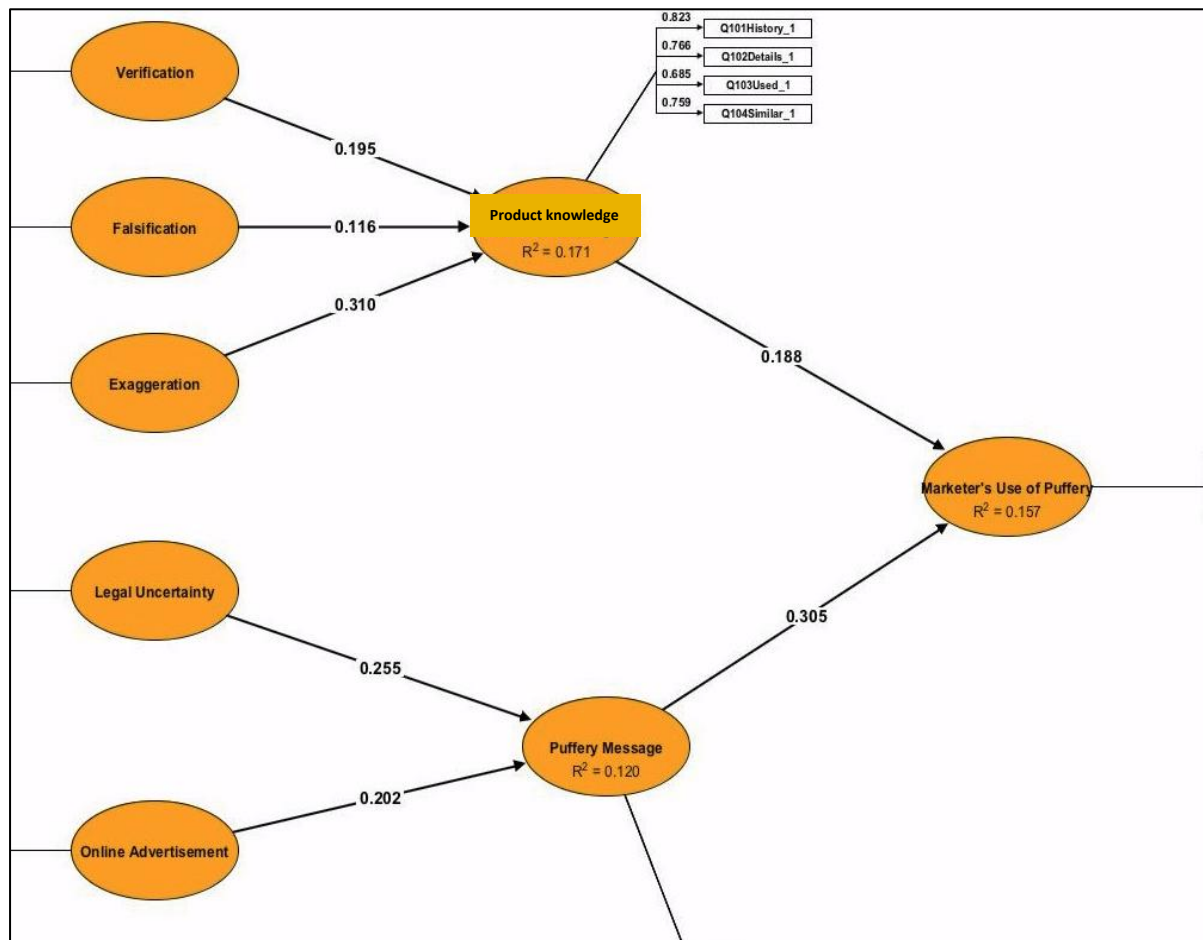
### 6.2.9 Impacts of Legal Uncertainty and Online Advertisement on Puffery Message; and of Puffery message on Marketers' use of puffery



**Figure 6.7 Impacts of Legal Uncertainty and Online Advertisement on Puffery Message; and of Puffery message on Marketers' use of puffery**

This path clearly shows that legal uncertainty faced by consumers as to where legal remedies lie had a direct impact on puffery usage by marketer. The online medium makes it challenging for consumers to verify authenticity of products and promotions when compared to the brick-and-mortar space. Legal uncertainty also stems from the fact that the buyer and seller may be from different parts of the globe, thus making legal actions seem somewhat distant and remedies even further away. 40% of the participants in the focus groups said that they had either not pursued remedies in the past or would not pursue remedies if they were misled.

### 6.2.10 Comparison between Puffery message and Product Knowledge



**Figure 6.8 Comparison between Puffery message and Product Knowledge**

The higher path coefficient moving from Puffery message to Marketers' use of puffery ( $\beta^a = 0.305$ ), as compared to the path coefficient moving from Product knowledge to Marketers' use of puffery ( $\beta^a = 0.188$ ), indicates that the Puffery message and its effect on consumers provides a greater impetus for marketers to use puffery. Product knowledge of consumers does not have a stronger impact on Marketer's use of puffery to dissuade its usage, because consumers are not certain about the truth of claims made.

### 6.2.11 Summation of the findings of hypotheses

It is clear from the findings that the hypotheses have been supported. Hypothesis 1 - Need for verification of product knowledge highlights consumer insecurities, which has been confirmed, highlights the fact that verification is necessary in online purchasing, as online advertisements cannot always be believed to be true. Hypothesis 2 - Falsification distorts consumer knowledge, which has been supported, indicates that exaggeration can impact upon the knowledge that

consumers possess. Hypothesis 3 - Exaggeration blurs the line between acceptable and misleading practice, as substantiated above, shows that puffery can have a misleading effect on consumers. Hypothesis 4 - Consumers uncertainty as to legal remedies enhances puffery usage, which has been proven, shows that the further the legal remedies are from the consumers, the higher the impetus for marketers and advertisers to use puffery. Hypothesis 5 - Online advertisements increase avenues for puffery messages, as substantiated above, proves that the online medium does help to exacerbate the uncertainty caused by puffery usage. Hypothesis 5 also proves the attractiveness of this medium for marketers. The substantiation of Hypothesis 6 - Consumers' lack of product knowledge impacts positively on marketers use of puffery, shows that consumer vulnerability is an incentive for increased puffery use by marketers. There is clearly a lacuna in the law that is being exploited. Hypothesis 7 - Tenets of puffery message increase consumers' perceptions of marketers' use of puffery, which has been supported, illustrates that the impact puffery has on purchases has the negative effect of misleading consumers. Thus, the survey findings have clearly shown that consumers are not on an equal footing with marketers. There is need for more regulation on puffery usage. This answers the second Secondary research question adequately, *How effective is the regulation of puffery in online advertisements?*

Having looked at the summation of the findings, the legal and marketing implications of this research are now presented.

### **6.3 Legal implications**

The examination of statutes, case laws and actions taken by the ACCC for consumer protection clearly gives us answers to the first Subsidiary research question, *What is the nature and extent of puffery regulation in online advertisement?* The following findings from secondary data and the focus groups put this into a better perspective. The examination of previous research on puffery and statutes and case law in place in Australia shows that puffery is not actionable, even though it can be misleading and plays a large part in influencing purchases. James (2017, p 397) definition of puffery as 'exaggerated and even false claims that are obviously so and clearly made to make a product or an advertisement interesting or attractive to consumers' confirms this too. Secondly, the line between what constitutes puffery and what is misleading practice is often a blurred one, as evidenced by the examination of case laws and actions taken by the ACCC against errant companies. Specific legislation would set defined parameters that

will eradicate the blurred line that exists between what constitutes puffery and misleading practice.

The premise on which puffery is justified as non-actionable by law is the concept of caveat emptor (let the buyer beware). This premise cannot be continued in light of the fact the buyer is no longer in a position to be able to know all the facts before making a purchase in the online medium. The consumer needs protection. The secondary data gathered and the findings of the survey and focus groups amply demonstrate this fact. The burden of caveat emptor should be transferred to sellers.

Puffery sits in a pre-contractual position and thus enjoys protection from liability. The exceptional situations in which pre-contractual statements can be brought to prove a case are if the statements made were misleading under the ACL or were misrepresentations. Puffery can be misleading, and this has been proven. This should provide the impetus to make puffery actionable. Puffery's pre-contractual position should not prevent it from being regulated. This would sit in line with the situation in Turkey, the first country to take a tough stand on puffery.

Online purchases can involve contracts made by parties in two different countries, and thus complications can arise as to legal enforcement of remedies. Protection is needed for Australian consumers who enter into online contracts. Defined laws in Australia will help protect consumers and provide necessary confidence to them. The need for certainty predicates that there be specificity in law. It should not be shaped on a case by case basis.

There is a lack of specific legislation to provide protection from consumers who are misled by puffery. This, therefore, answers the primary research question, *Is the current regulation of puffery in online advertisements adequate?* and the answer is no.

The focus groups helped to shed light on all three Research Questions. 18% of the participants (online consumers) did not know where to pursue legal remedies, and 40% said they had not pursued remedies. 40% of the participants were unsure as to when puffery crossed the line into being misleading, and 86% felt that online purchasing is challenging. 39% felt that misleading practices and puffery's contribution to misleading practice was a growing problem that needed to be tackled with tighter regulation. The survey helped to further confirm that marketers are more inclined to use puffery because of the uncertainty of purchasers. Consumers knew that they had no remedy for being misled by puffery, but they were also unsure as to what puffery was and what constituted misleading practice. The need for clarity in the law is evident. Thus, the current regulation of puffery in online advertisements is inadequate.

## 6.4 Marketing Implications

The continuous migration of consumers to the online medium has led to increased expenditure on the part of marketers to market via the Internet. Marketers use puffery to influence consumers' purchases. The survey findings confirm that marketers are able to use consumer uncertainty as to product knowledge and legal protection to their advantage. This answers the second Subsidiary research question, *How effective is the regulation of puffery in online advertisements?* It is important to align marketers' and consumers' understandings of puffery. This will prevent an exaggeration about a product by marketers being understood to be a truth by consumers.

There is obviously a lacuna in the law that is being exploited. The usage of puffery by marketers without repercussion makes the claims more appealing. Focus group findings indicate that 42% of the participants felt that the motive behind puffery usage was not legitimate, and 86% felt that there was a possibility of using alternatives to puffery.

The blurred line between puffery and misleading practice can become a costly mistake when the line is crossed. Marketers can obviously benefit from defined parameters with regard to puffery and misleading practices. This will help alleviate the situation of the large number of actions taken by the ACCC against companies that fall foul of the law.

The secondary data, focus group findings, and survey conclusions, all clearly illustrate that marketers use puffery because it works. Consumers' sentiments expressed through the focus groups (86% of participants) and the survey responses clearly favour advertising without puffery usage. This would bring advertising within the realms of ethical marketing.

## 6.5 Research questions and conclusions

Table 6.2 provides a summary of conclusions drawn from answering the 3 research questions.

**Table 6.2 Summary of conclusions**

| Research Question  | Conclusions  |
|--|--|
| <b>Primary Research question</b><br><i>Is the current regulation of puffery in online advertisements adequate?</i> | The current regulation of puffery in online advertisements is inadequate as puffery sits |

|  |   |
|--|---|
|  | <p>in a pre-contractual position. It only becomes actionable when it crosses the line and becomes classified as a misleading practice. The line is not very conclusive and is decided on a case-to-case basis. Despite its influence over purchases it still remains non-actionable. Specific legislation is required.</p>                                    |
| <p><b>Subsidiary research question one</b><br/> <i>What is the nature and extent of puffery regulation in online advertisements?</i></p> | <p>The examination of previous research on puffery and statutes and case law in place in Australia shows that puffery in online advertisements is not actionable. Puffery becomes actionable only if it becomes misleading. Misleading practices are regulated by ACL, Common law and regulatory bodies (for example ACCC and Consumer Affairs Victoria).</p> |
| <p><b>Subsidiary research question two</b><br/> <i>How effective is the regulation of puffery in online advertisements?</i></p>          | <p>The continuous litigation taken by ACCC and other regulatory bodies show that regulation is not as effective as it should be. The undeterred usage of puffery in online advertisements shows that regulation is not far-reaching and specific enough.</p>  |

## 6.6 Addressing the Research problem

The Secondary data gathered via literature review helped to develop the seven hypotheses for this research. The seven hypotheses were proven by usage of Focus groups and a Survey and the analysis done on the responses gathered. Data analysis was done using Partial Least Square–Structured Equation Modeling (PLS-SEM).

The seven hypotheses that were proven are as follows:

H1- Need for verification of product knowledge highlights consumer insecurities

H2- Falsification distorts consumer knowledge

H3- Exaggeration blurs the line between acceptable and misleading practice

H4- Consumers uncertainty as to legal remedies enhances puffery usage

H5- Online advertisements increase avenues for puffery messages

H6- Consumers' lack of product knowledge impacts positively on marketers use of puffery

H7- Tenets of Puffery message increases consumers perceptions of marketer's use of puffery

The evidence gathered shows that consumers need to have good knowledge of products prior to purchase so as to avoid being misled. Lack of knowledge on the part of consumers is an incentive for increased usage of puffery by marketers. The puffery used does lead to consumers being unsure of the truth of the advertisements. The increased use of the online medium by consumers gives marketers a larger platform to use puffery. The uncertainty of consumers as to legal recourse and the lack of remedies for being misled by puffery exacerbates matters further. All these conclusions drawn help answer the main research problem. There is a definite need for tighter regulations for puffery used in online advertisement.

### 6.6.1 The main theoretical contributions of this research

The main theoretical contributions of this research have been summarized in Table 6.3.

**Table 6.3 Theoretical contributions**

| Research question and conclusions made for each research question  | Status of research in the extant literature   | Previous key researchers   | Extent of contribution of this research to the current stock of knowledge |
|--|---|--|---|
| <b>Primary Research question</b><br><i>Is the current regulation of puffery in online advertisements adequate?</i> | Extant literature has proven that puffery does have an effect on purchases made in the brick and mortar space and | Olshavsky & Miller (1972)<br>Anderson (1973)<br>Olson & Dover (1978)<br>Oliver (1979)<br>Kamins (1985)<br>Cunningham & | This research contributes to existing knowledge by discussing puffery     |

|   |   |  |  |
|---|---|--|--|
| <p><b>Conclusion:</b><br/>The current regulation is inadequate. Puffery needs to be classified as a misleading practice.</p> <hr/> <p><b>Subsidiary research question one</b><br/><i>What is the nature and extent of puffery regulation in online advertisements?</i></p> <p><b>Conclusion:</b><br/>Misleading practices are regulated but puffery lacks specific regulation.</p> <hr/> <p><b>Subsidiary research question two</b><br/><i>How effective is the regulation of puffery in online advertisements?</i></p> <p><b>Conclusion:</b><br/>Regulation is not effective as it should be. More proactive measures need to be implemented to deter the continuous breaches of law that occur.</p> | <p>that it is used because it is effective in increasing profits.</p> <p>This research concludes that there is need for tighter regulation of puffery in online advertisements.</p> | <p>Cunningham(1977), Olson &amp; Dover (1978) Rotfeld &amp; Rotzoll (1980) Rotfeld &amp; Preston (1981) Kamins &amp; Marks (1987) Wyckham (1987) Oliver (1979) Vanden Bergh &amp; Reid (1979) Kamins &amp; Marks (1987) Richards (1990), Preston (1996) Cacioppo &amp; Petty (1989), Garcia-Marques &amp; Mackie (2001) Haan &amp; Berkey (2002) Cowley (2006) Campbell &amp; Wright (2008) Toncar &amp; Fetscherin (2012)</p> | <p>regulation in the online medium.</p> <p>It also presents a strong case for the shifting of the burden of Caveat emptor from the buyer to the seller when dealing with puffery regulation.</p> <p>This research sheds further light on the need for puffery to be classified as a misleading practice.</p> |
|---|---|--|--|

### 6.6.2 Research impact

The impact of this research on existing literature and its contribution in the area of puffery has been summarized in Table 6.4.



**Table 6.4 Research contribution**

| Area          | Contribution of the thesis  | Contribution to the literature  |
|---------------|---|---|
| Puffery       | <p>Highlighting the need for tighter regulation of puffery in online advertisements.</p> <p>Providing an impetus for classification of puffery as a misleading practice in light of e-commerce.</p> | <p>Extending the ambit of examination of puffery regulation to the online medium. Existing literature reviewed only looks at puffery effects and puffery in the brick and mortar space.</p> <p>Adding more weight to existing research argument that puffery can have negative effects on purchases made.</p> |
| Caveat Emptor | Advocating the shift of the burden of Caveat Emptor in puffery from buyer to seller.  | Examining the relevance of Caveat Emptor in the digital age   |

The next area to be discussed is legal reform, and the implications of this. The first step is to provide the justification for legislative reform, before recommendations can be made. This is the order in which the discussion takes place next.

### 6.7 Legal reform implications

A change in the law has to be justified on many levels before any decision is made to try and make that change possible. Foremost among the questions that can be asked is why is a change

even necessary (Sheehy & Feaver 2011). Change is sought for many different reasons, but one of the most important reasons is that existing laws in place are ineffective in curbing a problem or not as effective as they can be (Sheehy & Feaver 2011). The present research has shown why the existing law relating to puffery in online advertisements is not as effective as it can be. The research has also shown that tighter regulation is imperative to put consumers on an equal footing with the marketer and advertiser.

However, before a reform in the law is suggested, it is pertinent to examine the theories behind designing effective regulation and to look at the normative and positive aspects that support such a change. It is crucial for us to see whether such a situation is present with regard to laws relating to puffery and the research carried out in this thesis.

### ***6.7.1 Justification for Legislative Reform***

The first part of this discussion will look into justifying that the research findings fulfill the normative aspects of regulation change. The policy and the practices developed under the framework are two norms. Once these two norms are opposed, they will undermine each other. This leads to a failure to achieve the intended governance objectives and a waste of resources (Sheehy & Feaver 2011). When we relate this to the existing law relating to puffery, we find that the law in Australia seeks to prevent misleading and deceptive practices (s.18 and s.29, Competition and Consumer Act 2010) whilst allowing puffery, a practice that can mislead, to proceed with very little regulation. The objective and the law that has been put in place, that is, appear to be in contradiction.

Sheehy and Feaver (2011) state that an examination of human behavior and social practices is required to gain an idea about the problems they can generate. These are the practices and problems that tell legislators that there may be a need to regulate. Purchase decisions are influenced by puffery in advertisements, and thus, even though puffery is not classified as being a misleading practice, its effects can lead a consumer to be misled into purchasing a product that is not exactly as it is stated to be. The present research has highlighted previous research showing how puffery has an effect on human behavior. This research has also shown that online purchasing is steadily growing. The continuous litigation taken by ACCC for misleading practices is evidence that there is a problem and that this can be exacerbated as more consumers take to the online medium.

The question of whether to regulate is usually viewed as a political and highly ideological decision. The social problem has to be sufficiently important to warrant a coordinated response

(Sheehy & Feaver 2011). The problem highlighted in this research is loss of money through making purchases that do not turn out to be as expected. The reluctance to seek remedies if purchases are not substantial allows marketers and advertisers to benefit from usage of the misleading practice. Twenty-five other countries have varying levels of regulation of puffery, so any interaction in terms of trade will undoubtedly have implications (Chapter 2 Section 2.2).

On the other hand, rationalists state that deductive reasoning based on a scientific method should be used to identify and analyse an objectively determined, pre-existing problem. This will lead to a rationally generated solution acceptable to all (Dibadj 2012). The fact that puffery is allowed is because it is an exaggeration and not expected to be believed. It does not stand up to scientific measurement. So as long as it can be verifiable, then it no longer becomes puffery. Deductive reasoning thus tells us it is not a problem that needs to be addressed as it has its defined parameters. This approach, however, has significant shortcomings. It is known that humans often reject scientifically sound information inconsistent with their beliefs (Kahan & Braman 2002 and Nyhan & Reifler 2010). People will reject scientific opinion in favour of an opinion that supports their own world view (Nickerson 1998). The view that a consumer possesses is very much influenced by repetitive advertisements and marketing techniques that can confuse a purchaser. There are various promotional and packaging ploys to deceive consumers. The parameters are not very clear. This does become a problem for a consumer, and therefore, even if scientific deduction will justify puffery as not being a problem, consumers can feel it to be otherwise. The focus group and survey findings support this contention. Matters that require regulation are not always self-evident (Holland & Quinn 1987).

An alternative approach considers the influence of cognition, culture and related ideology within the broader context of social systems (D'Andrade 1995 and Oliver & Johnston 2000). The challenges posed by online purchasing, and lack of full knowledge about products, are factors that need to be looked when decisions are made regarding any changes in the law. The current culture and increasing use of e-commerce show us the need for timely regulation. The way the world transacts and is moving forward are important determinants for a call to action.

Once these factors are considered, the next question to be asked is whether it is the social practice or social result that needs to be the focus of the regulation (Sheehy & Feaver 2011). This asks us to decide whether the resulting regulation should be preventive or responsive to breaches. If a result needs to be prevented, then liabilities are established for non-compliance. If the social practice needs to be regulated, then tighter rules relating to the activity need to be put in place. The suggestion from this research is for the latter.

Three issues need to be addressed before this question can be answered. The first issue to be addressed is whether meaning is attached to the social practice, to the effect of that practice, or to both (Sheehy & Feaver 2011). The practices of online shopping and online advertising are socially very significant. They are the means by which goods are promoted and purchased. This fulfills basic needs of consumers for obtaining items for consumption. It also provides marketers the means by which demand for goods can be ascertained and fulfilled with a supply of those goods.

If the action has no particular socially significant meaning, it will not attract regulatory attention (Sheehy & Feaver 2011). In this case, the action of regulating such a social practice has high relevance and effect.

Secondly, if an action is perceived as having no effects of concern, that behavior is not perceived as problematic (Sheehy & Feaver 2011). The effects, although not critical at this stage, do have implications for consumer confidence in using the platform for purchases.

If the social effect is described as undesirable, the question is which, of the social effect, the social practice, or the meaning of a social practice, is to be the focus of the regulation (Sheehy & Feaver 2011). In this situation, tackling the social practice (usage of puffery in advertisements) as the focus of regulation.

Since social practices are the cause of social effects, regulation must target social practices to achieve the desired social effect (Sheehy & Feaver 2011). Putting into place tighter regulations will help to make the boundaries clearer, and thus the desired social effect of less misleading activity can be achieved.

The next aspect that requires discussion is coherence in legal systems.

### ***6.7.2 Coherence and legal systems***

Actors understanding and participation in coherent institutional relationships contribute to smooth functioning relationships. In normative coherence, facts are given normative significance and linked to rules. Rules determine which facts have legal significance. This process involves the exercise of discretion in interpreting rules and applying the facts to arrive at a coherent decision (Peczenik 1994 and Amaya 2011). The state of the law relating to puffery helps judges to decide when to put the foot down and declare it a misleading practice. Case laws appear to be decided on a case by case basis. The Red Bull out-of-court settlement in 2014

throws light on the influential power of puffery, and may cause judges to pay more heed to puffery before dismissing it as being not misleading.

The case of *Sullivan v Moody* (*Sullivan v Moody* 2001, 207 CLR 562, 581 [55]–[56]) is just one of the examples of judges relying on coherence as an evaluative tool. This case concerned a determination of whether a duty of care could be imposed upon medical practitioners to come to definite conclusions in a situation where only suspicion could be established. It was decided that it was not possible to impose such a heavy burden on medical practitioners, and this was determined on the basis of trying to arrive at a coherent decision. In order to be truly coherent, law must be narratively, normatively and systemically coherent at all its levels (Luhmann 1989).

Regulatory coherence, however, focuses on the relationships between the components and processes of regulatory systems. (Feaver 2006 and Durrant 2008). In this case, coherence can be established if the law in place and the regulatory bodies are in sync. The criticisms leveled against self-regulatory bodies in this area may point to the fact that they may not be as motivated as they should be in handling complaints against the very same bodies that fund their operations. The inability of the law to extend its protection to consumers when purchases are made beyond Australian borders also does not help achieve confidence or coherency.

The first component to be addressed under regulatory coherence involves perceiving the existence of a social problem (Sheehy & Feaver 2011). The feedback from the focus groups and survey have shown that puffery being a misleading practice is perceived as a social problem that needs to be checked before it grows to bigger proportions.

The second component under regulatory coherence is a series of decisions made when the social effects of a social practice are acknowledged as being a matter of social concern or an organising problem (Sheehy & Feaver 2011). The wheels will need to be put in motion to keep up with the examples set by other countries, so that standardization, as much as it is possible, can be achieved. The ACL was drafted to unify the position across Australia; and now considerations will have to be given to take it beyond Australia's shores.

The next step is the characterisation process. This involves classifying the organizing problem's social effects as being either a social issue (Olson Jr 1965; Granovetter 1985 and King & Lenox 2000), a risk, (Lee 1981), or an opportunity (Mitnick 1980). In this case, the problem can be classified for each of the categories in terms of varying degrees of seriousness. It may not be recognized as a big social problem, yet but it does happen quite frequently to

warrant action being taken. There is a risk of the problem growing if unchecked, and it is definitely an opportunity to set laws to be pre-emptive rather than responsive.

How the effects of a social practice are characterized depends on whether policymakers believe it is an objective or subjective problem. Experts use theoretical and disciplinary frameworks to further analyse and understand the problem. The problem is then assigned to either the public or private domain of society. This is an important step in moving the organizing problem to a policy response (Sheehy & Feaver 2011) What the present research aims to do is to draw to the attention of regulatory bodies and policymakers that puffery is an issue that requires some examination. It not only concerns private members engaging in purchases but also the public as a body of consumers. The present study thus puts forth a case for tighter regulation that will benefit all concerned. Where the organising problem is cast as being in the public domain, there is a normative imperative on the state to engage its power and resources to address it (Sheehy & Feaver 2011).

For normative coherency, the determinants of the characterization of the problem must align with the policy framed in response to that relationship. Regulation is more likely to fail where an incoherent alignment of policy objectives and targets is chosen (Sunstein et al, 2002). The problem at hand is that there is no specific legislation to deal with puffery with regard to online advertisements. The level of regulation present does not go as far as other countries have. The number of people shopping online is increasing, and marketers are increasing their budgets for online promotions. The policy framed should be able to regulate this area sufficiently to bring the law up to speed with strides taken by technology.

The four choices central to the policy framing process are:

- normative ordering (ranking of social effects to be responded to);
- clarifying the policy objective (what social effects are to be changed);
- identification of the policy targets (whose social practice is to be altered);
- determination and distribution of costs and benefits.

The next area to be addressed is external policy coherence.

### ***6.7.3 External policy coherence***

Effective regulation must also be coherent with the existing legal and institutional landscape. The question to be asked is, what is the most normatively coherent method for achieving policy objectives? Responsive regulation is not a regulatory approach. It is more of a strategy for

improving compliance (Sheehy & Feaver 2011). Sections 18 and 29 of the ACL are responsive regulations, as they determine liability for non-compliance. Regulation that prevents misleading practices is needed.

One of the reasons why incoherence at a policy level occurs is due to an unduly inflexible normative ordering which does not recognize the necessity of adjustment within a dynamic social or natural environment (May et al. 2005). The need for changes to be made with law relating to purchases that are made in the online medium is due to the disadvantages faced by consumers when using such a medium. The challenges are unique to the medium, and thus the laws that apply to purchases made in the brick-and-mortar space are not sufficient to protect consumers in cyberspace. Adjustment needs to be made in light of the fact that it would no longer be fair to impose caveat emptor on purchasers for this medium.

The characterization of the organizing problem provides a normative impetus for identifying an appropriate objective; which, in turn, determines the most appropriate approach. Among the four general principles that guide the selection of the most coherent regulatory approach, the two that are relevant to this research are:

- the state will regulate the social practice where the social effects of a social practice are characterised as having systemic implications (either a threat, harm or benefit), by prohibiting a practice, mandating the practice or altering it;
- the state will sanction a social practice where the social effects of a social practice are characterised as an opportunity to facilitate a social advancement or benefit. This is done by encouraging or enabling a specific group to engage in specified social practice (Sheehy & Feaver 2011).

The problem of puffery being misleading does have systemic implications, because it does cause harm to consumers. It would also be to the benefit of consumers if changes in the law are made to provide more confidence for the purchases they will make. Furthermore, social advancement can be seen in the help it would provide consumers in embracing and utilizing a method of purchasing which in the years to come may overtake purchases made in the brick-and-mortar space.

The normative components of designing effective regulation have been shown to exist, and the reasons behind why further regulation is required have been substantiated. The comparison shown and relevance drawn to the subject matter of this thesis help to indicate that there are grounds for a suggestion for reform. An examination of the positive components of

regulation design need also be taken into account before a complete case can be made for reform. A detailed discussion of this examination is presented next.

The positive dimension deals with the most effective way of changing undesirable social effects by altering the social practice. The positive dimension of regulation design looks beyond the components that make up the reason for the regulation and concentrates on how the regulation should be structured in order to effectively regulate the area in concern. In the context of the present research, the positive focus would be on determining what measures should be put in place to effectively control puffery usage.

The change to undesirable social effects can be brought about by the following:

1. mandating;
2. prohibiting;
3. modifying;
4. guiding; or
5. disciplining social practices (Feaver & Sheehy 2015).

What is being looked at in this case would fall within the categories of modifying, guiding or disciplining social practices. For example, the law relating to puffery can be modified so as to state that substantiation is always required for its usage and that messages portrayed should not have any chance of misleading consumers.

Traditional approaches look at rules and break them down into different configurations of ideas such as legal facts, judicial decisions and organizational constructs such as the roles of the police and courts (Raz1970; Hart 1961 and Stone 1964). A systemic approach, however, focuses on the interactions between the actors involved, their relationships, and the resulting effects of such a synergy (Feaver & Sheehy 2015). An examination of how the law is broken down allows for finding weaker links in the chain, but the newer approach looks at the problem from the interplay between the actors involved in seeing the regulation through. This approach may be more appropriate where there are self-regulatory bodies involved in enforcing obligations and guiding behaviour.

There are three levels of order in positive architecture. They are the structural, governance and operational levels:

1. The structural level sets out the power relationships among the actors in the system.



2. The governance level formalizes those power relationships. It does this by specifying the legal content of the relationships that binds those actors.
3. The operational level has the compliance and enforcement components (Giddens, cited in Feaver & Sheehy 2015).

The dynamic interaction between the players involved the area, and the way the law regulates those relationships helps determine the outcome of the policy put in place. With regard to puffery regulation, the relationships that were looked at are those between the ACL, regulatory codes, marketers, consumers, and self-regulatory bodies. The law impacts both the marketer and consumer. Any tightening of the law will thus have an effect on this relationship and impact upon compliance and enforcement component. Fines imposed, undertakings by companies, corrective advertising, and substantiation, will all see changes too if reforms are made.

The first area to be looked at is the structural dimension.

#### ***6.7.4 The structural dimension***

The connection and interaction between social actors helps distinguish one social structure from another. Social actors are linked by social practices. Factors that influence how actors rationalize and interact help shape social practices (Elder-Vass 2008). Buyers interact with sellers via the online medium, and the practice of online purchasing is affected by many factors. One factor is the amount of security provided by the law for such purchases. If this dynamic relationship and interaction is to increase, the law must be there to aid its growth.

When the characterization of a social problem is not coherently matched to the structural model chosen to deal with that problem, regulatory failure ensues (Feaver & Sheehy 2015). The attitude towards puffery needs to change. If its potentiality as a misleading practice is more widely accepted, then perceptions as to how far the law should go in order to regulate it may change and thus help define the structural model better.

The question to be asked is whether the problem is a social coordination problem (a social issue), a collective action problem (a risk), or a social enabler (an opportunity)? As determined earlier, changes in law relating to puffery present an opportunity for reform to eradicate the risk of abuse by marketers and to improve the social issue of misleading practice.

The governance level is the next aspect that needs to be discussed.

### ***6.7.5 The governance level***

The governance level specifies the legal content of those linkages between actors. It comprises two interdependent components:

1. the substantive component (governing the regulatee); and
2. the powers and functions component (empowering the regulator).

The substantive component is comprised of a body of rules that govern the conduct of a regulatee. Where powers conferred are not consistent with the functions, the result is an incoherent delegation of either functions or powers (Feaver & Sheehy 2015). The laws that govern puffery and misleading practice tell us when a consumer is able to get compensation for being misled. The subjective nature of the handling of the cases by the courts tells us that the law is not as settled as it could be. The powers to deal with cases in this area stem from the laws in place in this area. If these laws are not as far reaching as they should be, then the powers conferred are not consistent with the functions of the court or regulators who act as determiners of right outcomes.

A clear understanding of theories and postulations about human psychology and the relationship it has to human behaviour helps in the refinement of the law made to regulate it (Feaver & Sheehy 2015). The levels of understanding and factors that influence purchasing have been looked at in order to come up with this suggestion for reform. The imbalance in the relationship between the seller and the buyer has made caveat emptor highly questionable. The choice of more far-reaching regulation takes into account all these factors.

The next aspect that needs to be looked at is the operational level.

### ***6.7.6 The Operational level***

Researchers in this area (Ayers & Braithwaite 1992; Braithwaite, Makkai & Braithwaite; Braithwaite 2007; Braithwaite & Drahos 2000 and Sparrow 2000) have advocated that the proper handling of the regulatee and the usage of discretionary power to achieve that is required for enforcement that improves compliance.

Commanding, modifying, guiding and disciplining behaviour were identified as the four ways to alter social practices. These four approaches align with the normative characterizations of organizing problems as social coordination problems, risk problems and social opportunities.

- Mandating or prohibiting human behavior aligns with the traditional command-and-control method;
- modifying behavior aligns with risk-based methods;
- guiding behavior is achieved through the use of principles-based methods; and
- disciplining behavior is carried out through the use of social mechanisms such as the media, markets or other institutions (Ayers & Braithwaite 1992; Braithwaite, Makkai & Braithwaite 2007; Braithwaite 2007; Braithwaite & Drahos 2000 and Sparrow 2000).

The methods chosen to alter social practice are directly connected with how the problem is characterized. Then, coherence is achieved. The two methods, modifying and guiding, are seen to be more appropriate with regard to the handling of the puffery issue.

Modifying a social practice is better than mandating a completely different social practice. This involves the development and setting of standards of performance (Feaver & Sheehy 2015). The passing of the burden of caveat emptor to the seller is an example of modifying the social practice with regard to online purchasing. The imposition of the burden on the seller by the law involves the exercise of setting standards of performance.

Guiding behavior is effective so long as the organizing problem is not salient or urgent (Feaver & Sheehy 2015). This can be achieved by regulating the various players who interact with each other, for example the players in a particular industry. A regulation that affects one player in turn will impact upon how the other player in the industry can act or behave. The shifting of the burden of caveat emptor will help to streamline how the self-regulatory bodies, marketers and consumers can each play their part in online promotion and purchasing.

Regulation fails when the links between components of a regulatory system are incoherently aligned. This happened to the banking sector during the financial crisis of 2007-2008. The near failure of the banking system was caused by the fact that the regulations in place were not strict enough. The regulations took the form of persuasion rather than prohibition (Feaver & Sheehy 2015). While the impact of puffery regulation on purchases is not going to be as far-reaching as that of such a financial crisis, the regulation of the area currently takes a similar stand, leaning towards persuasion rather than prohibition. The end result cannot be very far from failure in the long run.

The positive dimension of designing effective regulation has been looked at in lieu of a suggestion for reform. The normative dimension of designing effective regulation was also

fulfilled and deemed applicable to the present research. The research in this area provides ample evidence that all the criteria for change suggested by normative and positive theories of effective regulation have been met, and thus a recommendation for reform can be substantiated. The recommendation for reform is presented next.

## **6.8 Recommendation summary**

A strong case has been presented for the need for tighter regulation in the area of puffery in online advertisements. Consumers will benefit from better protection, and the law will keep pace with changes in the way world trades. A recommendation can now be made to the ACCC for consideration of the need for tighter regulation and the benefits that flow from greater clarity in the area of misleading practice and the role puffery plays in it. The blurred line between puffery and misleading practice need not exist anymore if puffery is classed as a misleading practice. The conception that puffery is not actionable because it is not believed has to be cast aside. Puffery is an exaggeration Evidence in this study proves that it is an effective tool in influencing consumers' perceptions. It creates uncertainties that are open to exploitation. The growing problem of misleading practice and efforts that need to be taken to regulate it can be reduced. Changes in law are a complex process that involve many stages, and this study recognises that. The starting point for any movement towards change invariably begins with the need for the change being highlighted. This research hopes to draw attention to the fact that, although this may be a small area in the whole scheme of misleading practice regulation, it has the potential for making a big impact. To summarize, the three main recommendations are as follows:

1. Tighter regulations to be imposed on puffery usage in online advertisements, as it has the potential to be misleading.
2. The burden of caveat emptor in relation to puffery to be shifted from the buyer to the seller via amendments to legislation.
3. The law relating to puffery be updated in light of the challenges posed by e-commerce.

## **6.9 Limitations of this research**

This research focuses on puffery usage in the online medium only. It does not look at puffery usage as a whole, because the online medium is becoming the largest marketplace for consumers. The research does not examine puffery usage in the brick-and-mortar space and the various avenues used to promote it in that space. This is because of the heightened vulnerabilities of consumers in the online space, which warrant greater attention. The research

also did not look at the legal implications of how possible changes in law in Australia will impact upon legal regulation in other countries. That will be examined as a follow up to this research in further study beyond this thesis. The other limitation of the study is the small sample sizes. The sample sizes, however, fulfil the required sample sizes for this research as shown in Section 5.4.4 of Chapter 5.

## **6.10 Overall summary**

All three research questions have been answered via a review of secondary data and the qualitative and quantitative methods employed in this research. The answers to these questions do indicate a need for tighter regulation in the area of puffery usage in online advertisements. Consumers need to be put on an equal footing with marketers. The imbalance has to be set right because consumers deserve to be told the truth, the whole truth and nothing but the truth!

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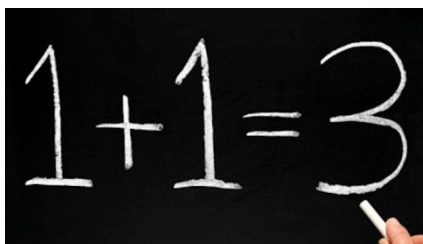
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## APPENDIX I: SUMMARY OF FOCUS GROUP FINDINGS

| Components   | Participants' Responses  | Inference  |
|--|--|--|
| <b>Puffery</b> <ul style="list-style-type: none"> <li>Consumer understanding</li> <li>Recognised puffery</li> <li>Sufficient aids for verification</li> </ul>                          | <ul style="list-style-type: none"> <li><b>Yes</b> -56% <b>No</b> -14% <b>Uncertain</b> -30%</li> <li><b>Yes</b> - 60% <b>No</b> – 9% <b>Uncertain</b> -31%</li> <li><b>Yes</b> - 65% <b>No</b> -35%</li> </ul> | <ul style="list-style-type: none"> <li>Potential for being misled</li> <li>Boundary lines not clear</li> <li>Consumer investigation essential before purchase</li> </ul> |
| <b>Online transactions</b> <ul style="list-style-type: none"> <li>Challenging</li> </ul>   | <ul style="list-style-type: none"> <li>Inability to examine products – 40%</li> <li>Legal recourse -30%</li> <li>Financial -12%</li> <li>Not challenging -18%</li> </ul>                                       | <ul style="list-style-type: none"> <li>Consumers not on equal bargaining strength</li> </ul>   |
| <b>Consumer</b> <ul style="list-style-type: none"> <li>Knowledge required of product before purchase</li> <li>Misled before</li> <li>Misleading practices are a big problem</li> </ul> | <ul style="list-style-type: none"> <li><b>High</b> -82% <b>Low</b> - 22%</li> <li><b>Yes</b> – 86% <b>No</b> -14%</li> <li><b>Yes</b> - 69% <b>No</b> -31%</li> </ul>  | <ul style="list-style-type: none"> <li>Easy to be misled</li> <li>Online purchasing is challenging</li> <li>Awareness increasing</li> </ul>                              |
| <b>Statutes, Case Laws and ASR</b> <ul style="list-style-type: none"> <li>Is there sufficient protection?</li> <li>Pursue remedies</li> </ul>  | <ul style="list-style-type: none"> <li>Yes and knew who provided protection – 82%</li> <li>Yes but did not know who provided protection -18%</li> <li><b>Yes</b> -60% <b>No</b>- 40%</li> </ul>                | <ul style="list-style-type: none"> <li>Consumers aware of rights</li> <li>Remedies not easily obtained</li> </ul>  |
| <b>Marketers</b> <ul style="list-style-type: none"> <li>Motive behind puffery - usage was legitimate</li> <li>Possibility of using alternatives to puffery</li> </ul>                  | <ul style="list-style-type: none"> <li><b>Yes</b> – 58% <b>No</b>- 42%</li> <li><b>Yes</b> -86% <b>No</b> -14%</li> </ul>  | <ul style="list-style-type: none"> <li>Ethical issue</li> <li>Change is viable</li> </ul>  |

## APPENDIX II: ADVERTISEMENTS FOR RESEARCH PARTICIPANTS



### PUFFERY IN ONLINE ADVERTISING

## RECRUITMENT ADVERTISEMENT

You are invited to participate in a Survey being conducted for the purpose of establishing whether puffery used in online advertising needs further regulation. Puffery refers to exaggerated statements made about a product that is not deemed misleading and thus not actionable in law.

The survey will require you to answer a Questionnaire which consists of 20 questions and will take 30 minutes of your time. There are no risks and direct benefits associated with participating in this survey. Participation in this Survey is on a voluntary basis and you may opt out of the Survey at any point of time. Anonymity will be preserved.

The purpose of the survey is to gather data for a thesis project which is titled 'An Investigation into the need for further regulation in the area of puffery in online advertisements'. The thesis is from RMIT University and further details as to the persons conducting this project will be provided to you in the Participant Information sheet which will be given to you prior to participating in the Survey.

The details for the Survey are as follows:

Date: .....

Time: .....

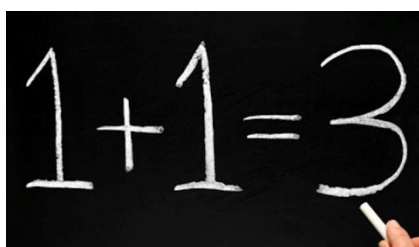
Venue: .....

Criteria for participation: Must be 18 years and above

Must have purchased goods online

*If you have any concerns about your participation in this project, which you do not wish to discuss with the researchers, then you can contact the Ethics Officer, Research Integrity,*

Governance and Systems, RMIT University, GPO Box 2476V VIC 3001. Tel: (03) 9925 2251 or email [human.ethics@rmit.edu.au](mailto:human.ethics@rmit.edu.au)



### PUFFERY IN ONLINE ADVERTISING

## RECRUITMENT ADVERTISEMENT

You are invited to participate in a Focus group being conducted for the purpose of establishing whether puffery used in online advertising needs further regulation. Puffery refers to exaggerated statements made about a product that is not deemed misleading and thus not actionable in law.

You will be asked to participate in a Focus group discussion that will require your insights about issues connected with puffery and online advertisements. This will take 1 hour of your time. There are no risks and direct benefits associated with participating in this survey. Participation in this Focus Group is on a voluntary basis and you may opt out of the Focus Group at any point of time. Anonymity will be preserved.

The purpose of the Focus Group is to gather data for a thesis project which is titled 'An Investigation into the need for further regulation in the area of puffery in online advertisements'. The thesis is from RMIT University and further details as to the people conducting this project will be provided to you in the Participant Information sheet which will be given to you prior to participating in the Focus Group.

The details for the Focus Group are as follows:

Date: .....

Time: .....

Venue: .....

Criteria for participation: Must be 18 years and above

Must have purchased goods online

*If you have any concerns about your participation in this project, which you do not wish to discuss with the researchers, then you can contact the Ethics Officer, Research Integrity, Governance and Systems, RMIT University, GPO Box 2476V VIC 3001. Tel: (03) 9925 2251 or email [human.ethics@rmit.edu.au](mailto:human.ethics@rmit.edu.au)*

## APPENDIX III: PARTICIPATION INFORMATION CONSENT FORMS



### INVITATION TO PARTICIPATE IN A RESEARCH PROJECT

#### PARTICIPANT INFORMATION

**Project Title:** An investigation into the need for further regulation in the area of puffery in advertisements, in light of E-Commerce.

**Investigators: Chief Investigator**

Associate Professor Siva Muthaly  
Associate Professor of Marketing  
HDR Coordinator – Graduate School of Business and Law

**Secondary Investigator**

Associate Professor Benedict Sheehy  
Associate Professor, Law - Graduate School of Business & Law

**Principal Research Student**

Ravinthiran Vijayasingam (MBA. LLB)

Dear .....,

You are invited to participate in a research project being conducted by RMIT University [Please read this sheet carefully and be confident that you understand its contents before deciding whether to participate. If you have any questions about the project, please ask one of the investigators.

**Who is involved in this research project? Why is it being conducted?**

This research is a student project for the purpose of writing a thesis for the PhD Law (DR206) course being undertaken by Ravinthiran Vijayasingam. The person involved in the collection of data will be Ravinthiran Vijayasingam and he will be supervised by Associate Professor Siva Muthaly and Associate Professor Benedict Sheehy. This project has been approved by the RMIT Human Research Ethics Committee.

**Why have you been approached?**

You have been approached because you fit into the category that falls in the second stage of this research project.

### **Stages of Research**

1. The first stage of this research involves data collection via focus groups. The focus groups will consist of consumers who will be chosen utilizing a judgmental approach based on characteristics. The participants will be sourced from companies having customer database repositories. It will have an equal balance of gender and age. There will be three focus groups consisting of eight members per group.
2. The second stage of this research will involve an online Survey being conducted with 200 participants who are consumers and who have purchased goods online. The participants will be from Melbourne and will be gathered by the companies with customer database repositories. Once again, it will have an equal balance of gender and age. They will be requested to answer 27 questions in a Survey which will be found on the RMIT website.

### **What is the project about? What are the questions being addressed?**

This project is seeking to establish whether there needs to be tighter controls on the usage of puffery in online advertisements. Puffery is an exaggeration made about a product that is used to help promote it. Puffery is not actionable by law as it is deemed that the consumer will not believe the exaggerated statements made about a product and thus it is not misleading. Statements about products are considered puffery if they do not relate to any claims about capabilities or qualities a product has which are measurable. Previous research has however shown that puffery can have an effect on the purchasing decisions made by consumers. There are an increasing number of people in Australia and around the world who now shop online. Given the fact that customers are not able to verify authenticity of claims made about products in an online medium, it is important that consumers are not misled by advertisements that can be potentially misleading because of the puffery used. It is also important to ascertain whether the law and regulatory bodies that govern this area are providing sufficient protection in this area under examination.

The research questions in this area are:

1. Is the current regulation of puffery in online advertisements adequate?
2. What is the nature and extent of puffery regulation in online advertisements?
3. How effective is the regulation of puffery in online advertisements?

### **If I agree to participate, what will I be required to do?**

In this study, you will be asked to participate in a focus group that will discuss the topic in an interactive setting. Questions relating to puffery and its effects will be discussed amongst group members. Viewpoints and opinions will be gathered from the group members to form conclusions.

Sample questions in Focus Group:

*What is your understanding of puffery used in advertisements*

### **Time Commitment**



A focus group session will take about an hour to complete.

### **What are the possible risks or disadvantages?**

There are no perceived risks outside the participant's normal day-to-day activities.

"If you are unduly concerned about your responses to any of the questions or if you find participation in the project distressing, you should contact Associate Professor Siva Muthaly as soon as convenient. He will discuss your concerns with you confidentially and suggest appropriate follow-up, if necessary".

### **What are the benefits associated with participation?**

There is no direct benefit to the participant as a result of their participation.

### **What will happen to the information I provide?**

All data collected will retain confidentiality of the participant's input. Individual participants will not be identifiable.

Results from the study will be included in a thesis or report, may appear in publications or be presented at conferences. Publications will be an Appropriate Durable Record (ADR).

The thesis, if accepted, will be kept in the RMIT Repository. This is a publicly accessible online library of research papers. The research data will be kept securely at RMIT for 5 years after publication, before being destroyed. The final research paper will remain online.

Any information that you provide can be disclosed only if (1) it is to protect you or others from harm, (2) if specifically required or allowed by law, or (3) you provide the researchers with written permission.

Data collected will be aggregated. Pseudonyms or other de-identifying techniques will be used if the need arises.

### **What are my rights as a participant?**

- The right to withdraw from participation at any time
- The right to request that any recording cease
- The right to have any unprocessed data withdrawn and destroyed, provided it can be reliably identified, and provided that so doing does not increase the risk for the participant.
- The right to have any questions answered at any time.

### **Whom should I contact if I have any questions?**

1. Associate Professor Siva Muthaly
2. Ravinthiran Vijayasingam

**What other issues should I be aware of before deciding whether to participate?**

None

*Yours sincerely*

1. Associate Professor Siva Muthaly

.....

2. Associate Professor Benedict Sheehy

.....

3. Ravinthiran Vijayasingam

.....

*If you have any concerns about your participation in this project, which you do not wish to discuss with the researchers, then you can contact the Ethics Officer, Research Integrity, Governance and Systems, RMIT University, GPO Box 2476V VIC 3001. Tel: (03) 9925 2251 or email [human.ethics@rmit.edu.au](mailto:human.ethics@rmit.edu.au)*

## CONSENT FORM

1. I have had the project explained to me, and I have read the information sheet.
2. I agree to participate in the research project as described.
3. I agree:
  - to take part in a focus group
4. I acknowledge that:
  - (a) I understand that my participation is voluntary and that I am free to withdraw from the project at any time and to withdraw any unprocessed data previously supplied (unless follow-up is needed for safety).
  - (b) The project is for the purpose of research. It may not be of direct benefit to me.
  - (c) The privacy of the personal information I provide will be safeguarded and only disclosed where I have consented to the disclosure or as required by law.
  - (d) The security of the research data will be protected during and after completion of the study. The data collected during the study may be published, and a report of the project outcomes may be provided to me upon request. Any information which will identify me will not be used.

## Participants Consent

Participant: \_\_\_\_\_ Date: \_\_\_\_\_  
(Signature)



## **INVITATION TO PARTICIPATE IN A RESEARCH PROJECT**

### **PARTICIPANT INFORMATION**

**Project Title:** An investigation into the need for further regulation in the area of puffery in advertisements, in light of E-Commerce.

**Investigators: Chief Investigator**

Associate Professor Siva Muthaly  
Associate Professor of Marketing  
HDR Coordinator – Graduate School of Business and Law

**Secondary Investigator**

Associate Professor Benedict Sheehy  
Associate Professor, Law - Graduate School of Business & Law

**Principal Research Student**

Ravinthiran Vijayasingam (MBA. LLB)

Dear .....,

You are invited to participate in a research project being conducted by RMIT University [Please read this sheet carefully and be confident that you understand its contents before deciding whether to participate. If you have any questions about the project, please ask one of the investigators.

**Who is involved in this research project? Why is it being conducted?**

This research is a student project for the purpose of writing a thesis for the PhD Law (DR206) course being undertaken by Ravinthiran Vijayasingam. The person involved in the collection of data will be Ravinthiran Vijayasingam and he will be supervised by Associate Professor Siva Muthaly and Associate Professor Benedict Sheehy. This project has been approved by the RMIT Human Research Ethics Committee.

**Why have you been approached?**

You have been approached because you fit into the category that falls in the second stage of this research project.

### **Stages of Research**

3. The first stage of this research involves data collection via focus groups. The focus groups will consist of consumers who will be chosen utilizing a judgmental approach based on characteristics. The participants will be sourced from companies having customer database repositories. It will have an equal balance of gender and age. There will be three focus groups consisting of eight members per group.
4. The second stage of this research will involve an online Survey being conducted with 200 participants who are consumers and who have purchased goods online. The participants will be from Melbourne and will be gathered by the companies with customer database repositories. Once again, it will have an equal balance of gender and age. They will be requested to answer 27 questions in a Survey which will be found on the RMIT website.

### **What is the project about? What are the questions being addressed?**

This project is seeking to establish whether there needs to be tighter controls on the usage of puffery in online advertisements. Puffery is an exaggeration made about a product that is used to help promote it. Puffery is not actionable by law as it is deemed that the consumer will not believe the exaggerated statements made about a product and thus it is not misleading. Statements about products are considered puffery if they do not relate to any claims about capabilities or qualities a product has which are measurable. Previous research has however shown that puffery can have an effect on the purchasing decisions made by consumers. There are an increasing number of people in Australia and around the world who now shop online. Given the fact that customers are not able to verify authenticity of claims made about products in an online medium, it is important that consumers are not misled by advertisements that can be potentially misleading because of the puffery used. It is also important to ascertain whether the law and regulatory bodies that govern this area are providing sufficient protection in this area under examination.

The research questions in this area are:

4. Is the current regulation of puffery in online advertisements adequate?
5. What is the nature and extent of puffery regulation in online advertisements?
6. How effective is the regulation of puffery in online advertisements?

### **If I agree to participate, what will I be required to do?**

In this study, you will be asked to either participate in a survey by answering 27 questions in a questionnaire. Anonymity will be maintained.

#### *Sample questions in Survey:*

Q3. What is puffery?

Q4. What is the frequency of usage of puffery in online advertisements?

## **Time Commitment**

The survey can be completed in half an hour.

## **What are the possible risks or disadvantages?**

There are no perceived risks outside the participant's normal day-to-day activities.

"If you are unduly concerned about your responses to any of the questions or if you find participation in the project distressing, you should contact Associate Professor Siva Muthaly as soon as convenient. He will discuss your concerns with you confidentially and suggest appropriate follow-up, if necessary".

## **What are the benefits associated with participation?**

There is no direct benefit to the participant as a result of their participation.

## **What will happen to the information I provide?**

All data collected will retain confidentiality of the participant's input. Individual participants will not be identifiable.

Results from the study will be included in a thesis or report, may appear in publications or be presented at conferences. Publications will be an Appropriate Durable Record (ADR).

The thesis, if accepted, will be kept in the RMIT Repository. This is a publicly accessible online library of research papers. The research data will be kept securely at RMIT for 5 years after publication, before being destroyed. The final research paper will remain online.

Any information that you provide can be disclosed only if (1) it is to protect you or others from harm, (2) if specifically required or allowed by law, or (3) you provide the researchers with written permission.

Data collected will be aggregated. Pseudonyms or other de-identifying techniques will be used if the need arises.

## **What are my rights as a participant?**

- The right to withdraw from participation at any time
- The right to request that any recording cease
- The right to have any unprocessed data withdrawn and destroyed, provided it can be reliably identified, and provided that so doing does not increase the risk for the participant.
- The right to have any questions answered at any time.

## **Whom should I contact if I have any questions?**

3. Associate Professor Siva Muthaly
4. Ravinthiran Vijayasingam

**What other issues should I be aware of before deciding whether to participate?**

None

*Yours sincerely*

4. Associate Professor Siva Muthaly

.....

5. Associate Professor Benedict Sheehy

.....

6. Ravinthiran Vijayasingam

.....

*If you have any concerns about your participation in this project, which you do not wish to discuss with the researchers, then you can contact the Ethics Officer, Research Integrity, Governance and Systems, RMIT University, GPO Box 2476V VIC 3001. Tel: (03) 9925 2251 or email [human.ethics@rmit.edu.au](mailto:human.ethics@rmit.edu.au)*

## CONSENT FORM

5. I have had the project explained to me, and I have read the information sheet.
6. I agree to participate in the research project as described.
7. I agree:
  - to take part in a focus group
8. I acknowledge that:
  - (c) I understand that my participation is voluntary and that I am free to withdraw from the project at any time and to withdraw any unprocessed data previously supplied (unless follow-up is needed for safety).
  - (d) The project is for the purpose of research. It may not be of direct benefit to me.
  - (c) The privacy of the personal information I provide will be safeguarded and only disclosed where I have consented to the disclosure or as required by law.
  - (d) The security of the research data will be protected during and after completion of the study. The data collected during the study may be published, and a report of the project outcomes may be provided to me upon request. Any information which will identify me will not be used.

## Participants Consent

Participant: \_\_\_\_\_ Date: \_\_\_\_\_  
(Signature)



## **APPENDIX 1V : SURVEY QUESTIONNAIRE**

This is a survey developed by RMIT University Melbourne and has been designed to gather information about Puffery in Online Advertisements.

Puffery has been defined as 'exaggeration commendation used especially for promotional purposes. If you agree to participate in this survey, please answer all questions and tick the most appropriate response for the respective questions. For questions that require Scale responses, please tick the scale that corresponds to each possible answer in the question. Your participation is voluntary and all your responses will be confidentially managed. Anonymity is maintained. The questionnaire will take approximately 15 -20 minutes to complete. If you have any enquiries regarding this research, please do not hesitate to contact the investigator: Ravinthiran Vijayasingam, PhD Candidate, RMIT University.

Q1 "The study has been described to me above, and I have been informed about avenues for obtaining additional information regarding this study."

Yes, I agree to participate in the survey. Please begin the survey.

No, thank you

Q2 How many times have you done online shopping before?

1-3 times

4-7 times

8-10 times

More than 10 times

Q3 What is puffery?

|   | Strongly agree | Somewhat agree | Neither agree nor disagree | Somewhat disagree | Strongly disagree |
|---|----------------|----------------|----------------------------|-------------------|-------------------|
| Exaggeration/s about the product's characteristics            |                |                |                            |                   |                   |
| Biased statement/s about the product's capabilities           |                |                |                            |                   |                   |
| Claims of superiority over a competitor's products            |                |                |                            |                   |                   |
| Message/s in an advertisement that can be proven to be untrue |                |                |                            |                   |                   |

Q4 What is the frequency of usage of puffery in online advertisements?

|  | Strongly agree | Somewhat agree | Neither agree nor disagree | Somewhat disagree | Strongly disagree |
|--|----------------|----------------|----------------------------|-------------------|-------------------|
| All online advertisements use puffery    |                |                |                            |                   |                   |
| Most online advertisements use puffery   |                |                |                            |                   |                   |
| Some online advertisements use puffery   |                |                |                            |                   |                   |
| Online advertisements do not use puffery |                |                |                            |                   |                   |

Q5 How do you determine that puffery has been used?

|  | Strongly agree | Somewhat agree | Neither agree nor disagree | Somewhat disagree | Strongly disagree |
|--|----------------|----------------|----------------------------|-------------------|-------------------|
| Based on the claim made, it is clear that it is an exaggeration            |                |                |                            |                   |                   |
| By taking steps to verify the authenticity of the claims made              |                |                |                            |                   |                   |
| Based on knowledge of the past practice of the company selling the product |                |                |                            |                   |                   |

Q6 How frequently do you use the following sources to verify claims made in online advertisements?

|   | Always | Most of the time | About half the time | Sometimes | Never |
|---|--------|------------------|---------------------|-----------|-------|
| Checking with others online                               |        |                  |                     |           |       |
| Checking buyers' confidence ratings                       |        |                  |                     |           |       |
| Using a search engine like Google to get more information |        |                  |                     |           |       |
| Consumer Affairs Reports                                  |        |                  |                     |           |       |
| Sourcing information offline                              |        |                  |                     |           |       |

Q7 Why do marketers use puffery?

|   | Strongly agree | Somewhat agree | Neither agree nor disagree | Somewhat disagree | Strongly disagree |
|---|----------------|----------------|----------------------------|-------------------|-------------------|
| To help promote their products              |                |                |                            |                   |                   |
| To make their products seem more attractive |                |                |                            |                   |                   |
| To entice consumers to buy their products   |                |                |                            |                   |                   |
| To unfairly differentiate their product     |                |                |                            |                   |                   |

Q8 Describe the accuracy of the following statement with regards to your own experience with online purchasing

|                                  | Strongly agree | Somewhat agree | Neither agree nor disagree | Somewhat disagree | Strongly disagree |
|----------------------------------|----------------|----------------|----------------------------|-------------------|-------------------|
| Online purchasing is challenging |                |                |                            |                   |                   |

If Strongly disagree is selected, then skip to Question 10

If Somewhat disagree is selected, then skip to Question 10

Q9 If online purchasing poses a considerable challenge, which of the following may be the reason for it?

|  | Strongly agree | Somewhat agree | Neither agree nor disagree | Somewhat disagree | Strongly disagree |
|--|----------------|----------------|----------------------------|-------------------|-------------------|
| Cannot verify the authenticity of the product                                  |                |                |                            |                   |                   |
| The prevalence of pop-ups that can cause a distraction                         |                |                |                            |                   |                   |
| The seller is seen to be deceitful (cannot determine details about the seller) |                |                |                            |                   |                   |
| Not very comfortable to disclose financial details                             |                |                |                            |                   |                   |

Q10 To what extent is it important for a consumer to have the following categories of knowledge about the product/s they are going to purchase online?

|   | Must have it | Very important | Slightly important | May be useful | Not required |
|---|--------------|----------------|--------------------|---------------|--------------|
| Need to know about the history of the product           |              |                |                    |               |              |
| Need to know all the details about the product          |              |                |                    |               |              |
| Need to have purchased and used the product before      |              |                |                    |               |              |
| Need to know about other similar products in the market |              |                |                    |               |              |

Q11 Where can misleading online advertisements be found?

|   | Strongly agree | Somewhat agree | Neither agree nor disagree | Somewhat disagree | Strongly disagree |
|---|----------------|----------------|----------------------------|-------------------|-------------------|
| A search result from a search engine (eg Yahoo, Google etc) |                |                |                            |                   |                   |
| Social Media platform (eg Facebook, Twitter etc)            |                |                |                            |                   |                   |
| Youtube   |                |                |                            |                   |                   |
| Email sites   |                |                |                            |                   |                   |

Q12 Have you been misled by an online advertisements before?

Yes

No

Answer Q13 if Yes is selected for Q12

If No is selected, skip to Q17

Q13 Have you ever managed to get a remedy for being misled by an online advertisements before?

Yes

No

Answer Q14 if Yes is selected for Q12

Q14 One of the reasons you were misled by the online advertisement was because of the puffery used.

Yes (1)

No (2)

If No is selected, then skip to Q16

Answer Q15 If Yes was selected for Q14

Q15 Did the puffery used

|   | Strongly agree | Somewhat agree | Neither agree nor disagree | Somewhat disagree | Strongly disagree |
|---|----------------|----------------|----------------------------|-------------------|-------------------|
| convince you that the claims made were true                         |                |                |                            |                   |                   |
| confuse you as to what was true and what was not                    |                |                |                            |                   |                   |
| seem not believable but nonetheless made the product more appealing |                |                |                            |                   |                   |
| raise a hope in you that it would be true                           |                |                |                            |                   |                   |



Answer if Yes was selected for Q12

Q16 Other possible reasons why you were misled by the online advertisement/s was because

|   | Strongly agree | Somewhat agree | Neither agree nor disagree | Somewhat disagree | Strongly disagree |
|---|----------------|----------------|----------------------------|-------------------|-------------------|
| you could not verify authenticity of the claim made                                     |                |                |                            |                   |                   |
| the advertisement was confusing   |                |                |                            |                   |                   |
| of the urgency in which you had to make decisions regarding the purchase of the product |                |                |                            |                   |                   |
| you were distracted by pop-ups  |                |                |                            |                   |                   |

Answer if No was selected for Q12

Q17 You were never misled by online advertisements before because

|  | Strongly agree | Somewhat agree | Neither agree nor disagree | Somewhat disagree | Strongly disagree |
|--|----------------|----------------|----------------------------|-------------------|-------------------|
| you understood the difference between the puffery used and what was misleading |                |                |                            |                   |                   |
| you verified the authenticity of the claims before making a purchase           |                |                |                            |                   |                   |
| the advertisements were not misleading   |                |                |                            |                   |                   |
| you were well informed about the product you were purchasing                   |                |                |                            |                   |                   |

Q18 To what extent do you agree with the following statement? Misleading online advertisements are a serious problem.

Strongly agree

Somewhat agree

Neither agree nor disagree

Somewhat disagree

Strongly disagree

Q19 What is the possibility of this problem growing?

Extremely likely

Somewhat likely

Neither likely nor unlikely

Somewhat unlikely

Extremely unlikely

Answer if No was selected for Q13

Q20 Is it possible to obtain a remedy if you are misled by an online advertisement?

Yes

No

Not sure

If No was selected, then skip to Q24

Q21 What is the avenue open to you if you have been misled by an online advertisement?

|  | Strongly agree | Somewhat agree | Neither agree nor disagree | Somewhat disagree | Strongly disagree |
|--|----------------|----------------|----------------------------|-------------------|-------------------|
| Bring an action in court   |                |                |                            |                   |                   |
| Report the matter to the Australian Competition and Consumer Council             |                |                |                            |                   |                   |
| Lodge a complaint with the Advertising Standards Board                           |                |                |                            |                   |                   |
| Report the matter to Consumer Affairs Victoria or its equivalent in other states |                |                |                            |                   |                   |
| Try and get a refund   |                |                |                            |                   |                   |

Q22 To what extent do you agree with the following statement? It is difficult to obtain a remedy for being misled by puffery in an online purchase.

Strongly agree

Somewhat agree

Neither agree nor disagree

Somewhat disagree

Strongly disagree

If Somewhat disagree was Selected, then skip to Q24

If

Strongly disagree was Selected, then skip to Q24

Q23 If obtaining a remedy poses a certain amount of difficulty, could any of the following be a reason for it?

|   | Strongly agree | Somewhat agree | Neither agree nor disagree | Somewhat disagree | Strongly disagree |
|---|----------------|----------------|----------------------------|-------------------|-------------------|
| Cost  |                |                |                            |                   |                   |
| It may be time consuming                                  |                |                |                            |                   |                   |
| It may not be protected by Australian Law                 |                |                |                            |                   |                   |
| There may be evidential difficulties in proving your case |                |                |                            |                   |                   |

Q24 Is it possible for marketers to promote their products successfully without usage of puffery?

Definitely yes

Probably yes

Might or might not

Probably not

Definitely not

Q25 The questions below are Demographic Profile questions and are used for data analysis purpose only. Your responses will be kept confidential. What is your gender?

Male

Female

Q26 What age group do you fall in?

18-20 years

21-30 years

31-40 years

41-50 years

51-60 years

Above 60 years

Q27 What is the highest level of your academic qualification?

Year 12

Bachelors Degree

Masters Degree

PhD

Technical and Further Education (TAFE) Qualification

Below Year 12

## APPENDIX V: RESEARCH ETHICS APPROVAL LETTER



**Business College Human  
Ethics Advisory Network  
(BCHEAN)**

Building 108, Level 11  
239 Bourke Street  
Melbourne VIC 3000

GPO Box 2476V  
Melbourne VIC 3001  
Australia

Tel. +61 3 9925 5555  
Fax +61 3 9925 5624

### Notice of Approval

Date: 28 October 2014

Project number: 18727

Project title: *An investigation into the need for further regulation in the area of puffery in advertisements, in light of E-Commerce.*

Risk classification: Low Risk

Principal Investigator: Associate Professor Siva Muthaly  
Student Investigator: Mr Ravinthiran Vijayasingam  
Other Investigator: Associate Professor Benedict Sheehy

**Project Approved: From: 28 October 2014 To: 28 October 2015**

### Terms of approval:

1. *Responsibilities of the principal investigator*  
It is the responsibility of the principal investigator to ensure that all other investigators and staff on a project are aware of the terms of approval and to ensure that the project is conducted as approved by BCHEAN. Approval is only valid while the investigator holds a position at RMIT University.
2. *Amendments*  
Approval must be sought from BCHEAN to amend any aspect of a project including approved documents. To apply for an amendment submit a request for amendment form to the BCHEAN secretary. This form is available on the Human Research Ethics Committee (HREC) website. Amendments must not be implemented without first gaining approval from BCHEAN.
3. *Adverse events*  
You should notify BCHEAN immediately of any serious or unexpected adverse effects on participants or unforeseen events affecting the ethical acceptability of the project.
4. *Participant Information and Consent Form (PICF)*  
The PICF must be distributed to all research participants, where relevant, and the consent form is to be retained and stored by the investigator. The PICF must contain the RMIT University logo and a complaints clause including the above project number.
5. *Annual reports*  
Continued approval of this project is dependent on the submission of an annual report.
6. *Final report*  
A final report must be provided at the conclusion of the project. BCHEAN must be notified if the project is discontinued before the expected date of completion.
7. *Monitoring*  
Projects may be subject to an audit or any other form of monitoring by BCHEAN at any time.
8. *Retention and storage of data*  
The investigator is responsible for the storage and retention of original data pertaining to a project for a minimum period of five years.

Regards,

Professor Roslyn Russell  
Chairperson  
RMIT BCHEAN

**Notice of Project Amendment Approval**

Date: 12 March 2015

Project Number: 18727

Project Title: *An investigation into the need for further regulation in the area of puffery in advertisements in light of E-Commerce*

Risk Classification: Low Risk

Principal Investigator: A/Prof Siva Muthaly  
Student Investigator: Mr Ravinthiran Vijayasingam  
Co-investigator: Mr Andrew Vaitiekunas**Project Approved:**                      **From:** 28 October 2014                      **To:** 22 July 2017**Project Amendment Approved:**                      **From:** 12 May 2015**Amendment Details:**

1. Extension approved until 22 July 2017, the maximum completion date of Ravinthiran's PhD. The candidate was previously enrolled in M Bus (Research). The program was upgraded to a PhD on 10 February 2015.
2. Change of second supervisor/co-investigator to Andrew Vaitiekunas as Benedict Sheehy has left RMIT.

**Terms of approval:**

1. *Responsibilities of the principal investigator*  
It is the responsibility of the principal investigator to ensure that all other investigators and staff on a project are aware of the terms of approval and to ensure that the project is conducted as approved by BCHEAN. Approval is only valid while the investigator holds a position at RMIT University.
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8. *Retention and storage of data*  
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Regards,

Dr Christopher Cheong  
Chairperson  
RMIT BCHEAN